UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAKE THE ROAD NEW YORK, et al.,

Plaintiffs,

Docket No. 19-cv-11633

- against-

MICHAEL POMPEO, et al.,

Defendants.

BRIEF OF AMICUS CURIAE STATES OF NEW YORK, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, THE DISTRICT OF COLUMBIA, THE COUNTY OF SANTA CLARA, AND THE CITIES OF NEW YORK, CHICAGO, LOS ANGELES, OAKLAND, PHILADELPHIA, AND SEATTLE IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

XAVIER BECERRA
Attorney General
State of California
1515 Clay Street, Suite 2000
Oakland, CA 94612

LETITIA JAMES
Attorney General
State of New York
Attorney for Amicus Curiae States
and Local Jurisdictions
28 Liberty Street
New York, NY 10005

(*Complete counsel listing continues on signature pages.*)

Dated: February 6, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Statutes

Legislative Materials

Administrative Materials **Page(s)**

Legal Sources

Agency Publications

Miscellaneous Authorities

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

INTEREST OF AMICI CURIAE

In this proceeding, plaintiffs seek a preliminary injunction to halt the implementation of three actions by the federal government that will restrict the granting of immigrant visas through consular processing. If allowed to come into effect, these actions would allow the executive branch to unilaterally reshape immigration policies and severely limit legal immigration to the United States in ways that Congress never authorized.

Two of the challenged actions involve changes made by the Department of State (DOS) to incorporate a sweeping interpretation of "public charge" that courts around the country have already found likely to be unlawful. The third action is a presidential proclamation that bars applicants from receiving immigrant visas unless they can establish that they either "will be covered by approved health insurance" within thirty days after entry or that they have the "financial resources to pay for reasonably foreseeable medical costs." Proclamation No. 9945, 84 Fed. Reg. 53,991 (Oct. 4, 2019) ("Proclamation"). For the many reasons articulated by plaintiffs, this Court should preliminarily enjoin these consular rules.

Amici States of New York, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, the District of Columbia, the County of Santa Clara, and the cities of New York, Chicago, Los Angeles, Oakland, Philadelphia, and Seattle have a strong interest in halting the implementation of these unlawful immigration restrictions. Each new restriction conflicts with Congress's stated policies in either federal immigration law or the Affordable Care Act (ACA). Each of them also represents a radical departure from the status quo that has governed consular processing of immigrant visa applications for decades. And, both individually and collectively, these consular rules will significantly harm

Amici States and local jurisdictions by severely reducing legal immigration and forcing immigrants who do enter the country to use substandard health coverage. As a result, Amici States and local jurisdictions will lose the enormous benefits that immigrants bring to our economies and communities. At bottom, the consular rules are "repugnant to the American Dream of the opportunity for prosperity and success through hard work and upward mobility." *State of New York v. DHS*, 408 F. Supp. 3d 334, 349 (S.D.N.Y. 2019), *appeal in briefing*, No. 19-3591 (2d Cir.).

ARGUMENT

I. Immigrants Are Vital to the Economic, Civic, and Social Fabric of Amici States and Local Jurisdictions.

The consular rules at issue here impose additional, unlawful barriers to the granting of legal permanent resident status that will significantly reduce the numbers of immigrant visas that defendants will issue. The two DOS public-charge rules are based on a statute that bars the admission of any noncitizen who "in the opinion of the consular officer at the time of application for a visa . . . is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). Although federal law does not expressly define "public charge," that phrase has a well-established meaning, stretching back more than a century, that limits its scope to individuals who are primarily dependent on the government for long-term subsistence. *See State of New York*, 408 F. Supp. at 346-47. The federal agencies that enforce this public-charge statute—including DOS—have adhered to this well-settled understanding for decades. *See* Compl. ¶¶ 155-75, 179-81. But DOS's new consular rules radically depart from this century-old understanding of "public charge," authorizing the denial of immigrant visas to any individual who a consular officer believes may, at any time in his or her life, receive nominal amounts of certain means-tested benefits, even for brief periods of time. *See id.* ¶¶ 87-104, 155-175. This novel and sweepingly broad interpretation of "public charge" has

already drastically increased the number of persons denied admission on this basis: DOS denied fewer than a thousand visa applications on public charge grounds in 2015, but under the new consular rules denied more than 13,000 applications on this ground in 2018.[1]

Similarly, many immigrants will not be able to satisfy the additional requirements of the President's healthcare proclamation and will be denied entry on that basis. One study has estimated that the Proclamation "could prohibit the entry of roughly 375,000 immigrants annually."[2]

The collective effect of these consular rules in reducing legal immigration will seriously harm Amici States and local jurisdictions. Immigrants are vital to the economic, civic, and social fabric of our communities. Immigrants bolster our economies by filling and creating jobs, starting businesses, paying taxes, and purchasing goods and services. They are valuable contributors to the neighborhoods where they work and reside, and are critical to Amici's long-term prosperity. But the consular rules challenged here will unlawfully bar hundreds of thousands of prospective immigrants from obtaining immigrant visas to which they would otherwise be entitled under the qualifications established by Congress. And because the majority of applications for such visas are family-based, these consular rules will perpetuate the separation of families. Such separation not

---

[1] *Compare* U.S. Dep't of State, Bureau of Consular Affairs, *Report of the Visa Office 2015*, tbl. XX (internet), *with* U.S. Dep't of State, Bureau of Consular Affairs, *Report of the Visa Office 2018*, tbl. XX (internet). (For sources available on the internet, full URLs appear in the Table of Authorities. All websites last visited February 4, 2020.)

In January 2018, DOS began applying its radical redefinition of "public charge" based on changes to its *Foreign Affairs Manual*, which governs consular processing. DOS subsequently issued an Interim Final Rule in October 2019, which seeks to alter the public-charge regulations that apply at the point of consular processing. *See* Compl. ¶ 3.

[2] Julia Gelatt & Mark Greenberg, *Health Insurance Test for Green-Card Applicants Could Sharply Cut Future U.S. Legal Immigration*, Migration Policy Institute (Oct. 2019) (internet).

only harms immigrants, their U.S. resident family members, and neighborhoods and communities across America, but also undermines Congress's repeatedly expressed intent for our immigration laws to facilitate rather than prevent family reunification.

A. The consular rules will result in the separation of families.

The consular rules at issue here will impose substantial harms on immigrants seeking to enter the country through family-sponsored visas.[3] Although the rules are not limited to family-sponsored immigrants, family-sponsored immigrants represent a large proportion of the individuals that Congress has authorized to immigrate here each year. And because family-sponsored immigrants are not required to have employment to obtain a visa, they are generally less likely to be able to satisfy the stringent requirements imposed by the new rules.

Congress prioritized family reunification when it established the current immigration system. "The Immigration and Nationality Act ('INA') was intended to keep families together." *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005). The INA's legislative history "establishes that congressional concern was directed at 'the problem of keeping families of United States citizens and immigrants united.'" *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) (quoting H.R. Rep. No. 85-1199, at 7 (1957)). During the debates surrounding the INA of 1965, Senator Edward Kennedy affirmed that "[r]eunification of families is to be the foremost consideration." S. Rep. No. 89-748, at 13 (1965). The importance Congress placed upon family reunification is demonstrated by the numeric limits and visa allotments set by the INA amendments of 1965, and refined by further amendments to the INA in 1990.[4] Immigration and Nationality Act, Pub. L. No. 89-236,

[3] *See* Gelatt & Greenberg, *supra*.

[4] *See* Zoya Gubernskaya & Joanna Dreby, *U.S. Immigration Policy and the Case for Family Unity*, 5 Journal on Migration and Human Security 417, 418 (2017) (internet).

79 Stat. 911 (1965); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. Unlike other visa categories, there is no limit on the number of immediate relatives of U.S. citizens, such as spouses, unmarried children under the age of twenty-one, and parents, who can immigrate here. 8 U.S.C. § 1151(b). Other family preference visas, such as those for adult children, siblings, and relatives of legal permanent residents, are capped at 480,000 per year (with a statutory minimum of 226,000), as compared to 140,000 annual employment visas. *Id.* § 1151(c)-(d).

Approximately 483,000 newly arrived individuals received visas as an immediate relative of a U.S. citizen or under family-sponsored visas preferences in 2017 (the most recent year for which data is available).[5] In that same year, an estimated 107,259 individuals obtained lawful permanent residence as immediate relatives of U.S. citizens or through family-sponsored preferences in New York, and 148,621 did so in California. Numbers in other States included, for example, 28,030 individuals in Massachusetts, 15,867 in Washington, 9,143 in Nevada, 5,533 in Oregon, 2,885 in the District of Columbia, and 1,551 in Delaware.[6]

The new restrictions imposed by the consular rules at issue here will likely result in hundreds of thousands of U.S. citizens and lawful permanent residents losing the opportunity to be united with their loved ones from abroad, including spouses, siblings, and adult children. Such prolonged or permanent family separations will have a devastating impact on the welfare of our residents.

---

[5] U.S. Dep't of Homeland Security, *2017 Yearbook of Immigration Statistics*, tbl. 6 (2018) (internet).

[6] *See* U.S. Dep't of Homeland Security, *Profiles on Lawful Permanent Residents* (internet) (select State from "State of Residence" drop-down menu). These figures include both new arrivals and individuals adjusting status because this DHS data combines those categories when breaking out class of admission.

Multiple studies illustrate that family reunification benefits the economic, social, and psychological well-being of the affected individuals,[7] while family separation results in myriad harms. Separating family members from each other can result in negative health outcomes, including (1) mental and behavioral health issues, which can lower academic achievement among children; (2) severe stress, which can delay brain development and cause cognitive impairment; and (3) symptoms of post-traumatic stress disorder.[8] Separation can be particularly traumatizing to children, resulting in a greater risk of developing mental health disorders such as depression, anxiety, and attention deficit hyperactivity disorder.[9] Trauma can also have negative physical effects on children, such as loss of appetite, stomachaches, and headaches, which can become chronic if left untreated.[10] Similarly, spousal separation can cause fear, anxiety, and depression.[11]

These harms are not limited to those family members most directly affected by the consular rules. Amici States and local jurisdictions will also feel the impact of such harms on their residents. Intact families provide crucial social support, which strengthens not only the family unit but also the neighborhood, community, and civic society at large. *See, e.g.*, *Moore v. East Cleveland*, 431

---

[7] *See* Gubernskaya & Dreby, *supra*, at 423.

[8] *See* Colleen K. Vesely, et al., *Immigrant Families Across the Life Course: Policy Impacts on Physical and Mental Health*, 4 National Council on Family Relations Policy Brief 1, 2-4 (July 2019) (internet).

[9] Allison Abrams, *Damage of Separating Families*, Psychology Today (June 22, 2018) (internet).

[10] *Id.*

[11] Yeganeh Torbati, *U.S. denied tens of thousands more visas in 2018 due to travel ban: data*, Reuters (Feb. 29, 2019) (internet) (describing a U.S. citizen's plight to obtain a visa for his wife, and that their separation was causing them both to "break down psychologically").

U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."). The Select Commission on Immigration and Refugee Policy, a congressionally appointed commission tasked with studying immigration policy, expounded upon the necessity of family reunification in 1981:

> [R]eunification . . . serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well-being of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States.[12]

By contrast, denying families the ability to reunite contradicts the foundations of our immigration system and will irreparably harm our families, neighborhoods, and communities.

B. Immigrants are key contributors to the economies of Amici States and Local Jurisdictions.

In the experience of Amici States and Local Jurisdictions, the benefits of immigration are profound and reciprocal. Not only do immigrants benefit from the opportunities associated with living in the United States, but the States and the country as a whole benefit from immigrants' contributions to our communities. From the outset, immigrants have enriched our country's social and cultural life, injecting new ideas into our intellectual fabric, offering path-breaking contributions in science, technology, and other fields, and ultimately making our diverse communities more desirable places to live.[13] The consular rules at issue here strike at this fundamental component of the American experience. And by imposing unreasonable and unlawful barriers to immigration,

---

[12] U.S. Select Comm'n on Immigration & Refugee Policy, *U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission of Immigration & Refugee Policy* 112 (Mar. 1, 1981) (internet).

[13] Darrell M. West, *The Costs and Benefits of Immigration*, 126 Political Science Quarterly 427, 437-41 (2011) (internet).

the consular rules will prevent many immigrants who satisfy the criteria for entry set by Congress from entering the country. That reduction will cause substantial economic harm to Amici, including by diminishing revenue collection, dampening the creation of small businesses, and reducing employment in key sectors of the economy.

Immigrants contribute to national, state, and local economies in many ways, including by paying taxes, starting businesses, contributing to state and local labor forces, and consuming goods and services. Nationally, immigrants pay over $458 billion in taxes, and immigrant-owned companies employ over 7.9 million workers.[14] Immigrants' economic contributions to Amici States and Local Jurisdictions are similarly staggering.

- Immigrant-led households in New York paid approximately $15.9 billion in state and local taxes in 2014, and wielded $103.3 billion in spending power.[15] Moreover, in 2017, immigrants contributed $228 billion to New York City's gross domestic product (GDP), or about 25.8% of the city's total GDP.[16]

- In 2014, immigrant-led households in California paid over $26 billion in state and local taxes and exercised $240 billion in spending power.[17]

- In Oregon in 2014, immigrant-led households paid $736.6 million in state and local taxes, and accounted for $7.4 billion in spending power.[18]

- Immigrant-led households in Massachusetts in 2014 paid $3 billion in state and local taxes, and accounted for $27.3 billion in spending power.[19]

---

[14] New Am. Econ., *Immigrants and the economy in: United States of America* (internet).

[15] American Immigration Council, *Immigrants in New York* 4 (Oct. 4, 2017) (internet).

[16] New York City Mayor's Office of Immigrant Affairs, *State of Our Immigrant City* 21 (Mar. 2019) (internet).

[17] *See* American Immigration Council, *Immigrants in California* 4 (Oct. 4, 2017) (internet).

[18] American Immigration Council, *Immigrants in Oregon* 4 (Sept. 15, 2017) (internet).

[19] American Immigration Council, *Immigrants in Massachusetts* 4 (Oct. 5, 2017) (internet).

- In 2010, 22% of Hawai'i's business owners were foreign-born,[20] and in 2014, immigrants contributed $668.5 million in state and local taxes and accounted for $5 billion in spending power.[21]

- In Connecticut, immigrants pay $7.4 billion in taxes, have a spending power of $16.1 billion, and employ over 95,000 people.[22]

- In 2014, immigrant-led households in Maine paid over $116.2 million in state and local taxes and exercised almost $953.9 million in spending power.[23]

- In Michigan, immigrants pay approximately $2.1 billion in state and local taxes, have a spending power of $18.4 billion, and comprise close to 34,000 of the state's entrepreneurs.[24]

- In Washington, immigrant-led households paid $2.4 billion in state and local taxes, and had $22.8 billion in spending power in 2014.[25]

- In Maryland, immigrant-led households paid $3.1 billion in state and local taxes, represented almost a fifth of Maryland small business owners, and exercised $24.6 billion in spending power.[26]

- In 2014, immigrant-led households in Minnesota earned $12.2 billion, had $8.9 billion in spending power, and paid $1.1 billion in state and local taxes.[27]

---

[20] Fiscal Policy Inst., *Immigrant Small Business Owners: A Significant and Growing Part of the Economy* 24 (June 2012) (internet).

[21] New Am. Econ., *The Contributions of New Americans in Hawaii* 7 (Aug. 2016) (internet).

[22] New Am. Econ., *Immigrants and the Economy in Connecticut* (internet).

[23] American Immigration Council, *Immigrants in Maine* 4 (Oct. 13, 2017) (internet).

[24] New Am. Econ., *Immigrants and the Economy in Michigan* (internet).

[25] American Immigration Council, *Immigrants in Washington* 4 (Oct. 4, 2017) (internet).

[26] American Immigration Council, *Immigrants in Maryland* 4 (Oct. 16, 2017) (internet).

[27] *See* New Am. Econ., *The Contributions of New Americans in Minnesota* 5-6 (Aug. 2016) (internet).

- In the District of Columbia, immigrant-led households paid $336.9 million in local taxes, and accounted for $2.9 billion in spending power in 2014.[28]

Immigrants also disproportionately fill positions in important sectors of the economy. In New York, immigrants made up 27.8% of the labor force in 2015, and held 49.1% of the healthcare support jobs and 43.2% of the building cleaning and maintenance jobs.[29] In California, immigrants make up over one third of the workforce, fill over two thirds of the jobs in the agricultural sectors, and hold 45.6% of the manufacturing positions, 43% of the construction jobs, and 41.3% of the computer and mathematical sciences positions.[30] In Oregon, immigrants accounted for 12.8% of the total workforce in 2015, 39.5% of workers in the farming, fishing, and forestry sector, and nearly 20% of the workers in manufacturing positions.[31] In Delaware, immigrants accounted for 11.9% of the total workforce in 2015, 27.9% of workers in computer and mathematical sciences, and 25.8% of the workers in life, physical, and social sciences.[32] In the District of Columbia, immigrants accounted for nearly 18% of the total workforce in 2015, 44.2% of the workers in the life, physical, and social sciences sector, and 42.6% of the workers in building and grounds cleaning and maintenance positions.[33] Similarly, in 2015, immigrants made up 20% of the labor force in

[28] American Immigration Council, *Immigrants in the District of Columbia* (Oct. 16, 2017) (internet).

[29] *Immigrants in New York*, *supra*, at 3-4.

[30] *Immigrants in California*, *supra,* at 2-4.

[31] *Immigrants in Oregon*, *supra*, at 2-4.

[32] American Immigration Council, *Immigrants in Delaware* 2-4 (Oct. 13, 2017) (internet).

[33] *See Immigrants in the District of Columbia, supra*, at 2.

Massachusetts;[34] 19.6% of the labor force in Maryland;[35] and 17.2% of the labor force in Washington.[36] Immigrants in New York City participate in the labor force at a rate of around 65%, roughly the same as New Yorkers overall and U.S.-born New Yorkers. Immigrants account for about half of New York City's business owners, and nearly half of the city's workforce.[37]

The interests of Amici States and Local Jurisdictions weigh heavily against unreasonable and unlawful barriers to immigration, such as the consular rules at issue here. Such barriers decrease the number of immigrants who enter the country legally under the criteria set by Congress, hinder the reunification of families to the detriment of our communities, and harm Amici States and Local Jurisdictions by preventing the entry of individuals who contribute positively to our workforces and grow our economies.

II. The Department of State's Broad New Interpretation of "Public Charge" Goes Far Beyond the Agency's Statutory Authority.

DOS's consular rules are based on the same statute as DHS's rule governing adjustment of status, 8 U.S.C. § 1182(a)(4)(A), and both sets of rules adopted the same radically new definition of "public charge." *See* Compl. ¶ 87. Five district courts have issued preliminary injunctions against the DHS rule,[38] holding, among other things, that the rule's new definition of "public charge" "has

---

[34] *Immigrants in Massachusetts*, *supra*, at 2.

[35] *Immigrants in Maryland*, *supra*, at 2.

[36] *Immigrants in Washington*, *supra*, at 2.

[37] *See State of Our Immigrant City*, *supra*, at 21.

[38] *See State of New York*, 408 F. Supp. 3d 334; *Washington v. DHS*, No. 19-cv-5210, 2019 WL 5100717 (E.D. Wa. Oct. 11, 2019); *City & County of San Francisco v. USCIS*, 408 F. Supp. 3d 1057 (N.D. Cal. 2019); *Casa de Maryland, Inc. v. Trump*, No. PWG-19-2715, 2019 WL 5190689

absolutely no support in the history of U.S. immigration law" and "is repugnant to the American Dream of the opportunity for prosperity and success through hard work and upward mobility."[39] *State of New York*, 408 F. Supp. 3d at 349.

These district courts got it right, and much of the same reasoning applies to DOS's rules here. DOS's unprecedented new interpretation of "public charge" sweeps far more broadly than that term of art has been understood for over a century. When Congress originally enacted the public-charge provision in 1882, it adopted the prevailing understanding—reflected in early state laws—that "public charge" was limited to "persons utterly unable to maintain themselves." Friedrich Kapp, *Immigration, and the Commissioners of Emigration of the State of New York* 87 (1870). "Public charge" has thus always meant individuals unlikely "to earn a living," *Wallis v. United States ex rel. Mannara*, 273 F. 509, 509 (2d Cir. 1921), not hard-working individuals who might receive any amount of benefits for a short period of time. *See, e.g., Gegiow v. Uhl*, 239 U.S. 3, 10 (1915); *United States ex rel. De Sousa v. Day*, 22 F.2d 472, 473-74 (2d Cir. 1927). As state and federal legislators explained, this limited meaning of "public charge" sought to guard against European governments sending individuals who were unable to work to this country, while continuing to encourage immigration by employable individuals who, despite their lack of wealth,

(D. Md. Oct. 14, 2019); *Cook County v. McAleenan*, No. 19 C 6334, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019).

[39] The Second and Seventh Circuits denied the federal government's requests to stay the preliminary relief issued by the district courts in New York and Illinois, respectively, while the Fourth and Ninth Circuits granted stays of the preliminary relief issued by the district courts in Maryland, Washington, and California, respectively. *See* Order, *State of New York v. DHS*, No. 19-3591 (2d Cir. Jan. 8, 2020), ECF No. 162; Order, *Cook County v. Wolf*, No. 19-3169 (7th Cir. Dec. 23, 2019), ECF No. 41; Order, *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019), ECF No. 21; *City & County of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). The Supreme Court granted a stay of the preliminary relief issued by the district court in New York. Order, *DHS v. New York*, No. 19A785 (U.S. Jan. 27, 2020).

contributed to the economy and could "become a valuable component part of the body-politic." 13 Cong. Rec. 5108 (1882) (Rep. Van Voorhis). And Congress incorporated this established understanding of "public charge" when it enacted the INA's public-charge provision in 1952, without redefining the term. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

Under DOS's rules, by contrast, a consular officer may now deny an immigrant visa if he believes that an applicant may at any time in his or her life receive only modest or temporary amounts of government benefits designed to promote health or upward mobility—even if the applicant is employed or employable. The rules now disqualify applicants based on their likely receipt of certain supplemental benefits, including Medicaid, Supplemental Nutrition Assistance Program (SNAP) benefits (food stamps), and Section 8 housing assistance, even though these benefits are not designed to provide primary subsistence. *See* Compl. ¶¶ 116-130. Moreover, a consular officer can now deem an immigrant to be a "public charge" based on the likely receipt of such benefits for just a few months: the officer need merely believe that an immigrant will "receive[ ] one or more public benefits" during "more than 12 months in the aggregate within any 36-month period" during his life. Visas: Ineligibility Based on Public Charge Grounds, 84 Fed. Reg. 54,996, 55,014 (Oct. 11, 2019). A consular officer must separately count each benefit an immigrant may receive in a single month for calculating the duration of benefits use, so that, for example, receipt of three benefits in one month will "stack" as three months of the twelve-month threshold. *Id.* And the rules do not merely allow consular officers to consider likely benefits use as a relevant factor, but rather redefine "public charge" so that if a consular officer "believes that an individual is likely" to use any amount of supplemental benefits for 12 out of 36 months during her entire life, "the inquiry ends there, and the individual is *automatically* considered a public charge,"

see State of New York, 408 F. Supp. 3d at 349—even if there is no plausible basis to infer that acceptance of such benefits indicates long-term dependence on the government for subsistence.

Each of these changes expands the meaning of "public charge" significantly beyond its permissible scope. The supplemental benefits programs that a consular officer must now consider do not serve only the truly destitute who historically have been considered public charges; instead, as DHS's predecessor agency and benefit-granting agencies previously determined, Congress made these supplemental benefits programs available as well to working individuals who have "incomes far above the poverty level," and who do not need such benefits for subsistence but rather for obtaining more nutritious food, safer housing, or better healthcare. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,692 (Mar. 26, 1999). Thus, an individual may be "fully capable of supporting herself without government assistance but elect[] to accept a benefit, such as public housing, simply because she is entitled to it." *State of New York*, 408 F. Supp. 3d at 348.

In addition, "public charge" has never been understood to mean those who need public assistance to deal with a temporary emergency or a brief period of financial strain. *See, e.g.*, *In re Martinez-Lopez*, 10 I. & N. Dec. 409, 421-22 (A.G. 1962); *In re Harutunian*, 14 I. & N. Dec. 583, 589 (B.I.A. 1974). But DOS's twelve-month threshold and "stacking" rule will allow a consular officer to deny an immigrant visa to an otherwise qualified applicant if the officer believes that the applicant may, at any point in his or her life, suffer a temporary emergency that would warrant public benefits for a few months. These substantial alterations to the well-established historical meaning of "public charge" stretch that statutory term far beyond "the bounds of reasonable interpretation," *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014).

Nowhere has DOS proffered a reasonable justification for this radical alteration of the long-established public-charge framework, particularly given the grievous harms that its consular rules will impose in keeping families apart and preventing hard-working immigrants from joining and contributing to our communities. See *supra* Point I. In particular, DOS has identified no concrete problems caused by the prior public-charge framework aside from the fact that it resulted in fewer denials of immigrant visas than the current consular rules. DOS simply failed to "adequately analyze…the consequences" of its actions or to justify the harms that its consular rules will inflict. *See American Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017).

III. The Healthcare Proclamation Also Conflicts with Congress's Objectives and Will Likely Adversely Affect Amici's Health Insurance Markets.

A. The Proclamation undermines Congress's objective of providing immigrants lawfully present here access to comprehensive and affordable coverage.

The ACA, enacted by Congress in 2010, is a landmark law that made affordable health coverage available to millions of individuals and sharply reduced the number of people without health insurance. [40] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). The statute authorized the creation of local, state-based marketplaces that present affordable insurance coverage choices to consumers in order to "increase the number of Americans covered by health insurance and decrease the cost of health care." *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012). The state-based marketplaces—also known as exchanges—"allow[] people to compare and purchase insurance plans." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). To purchase health insurance through an exchange, a person must prove that they:

[40] *See* Kaiser Family Foundation, *The Uninsured and the ACA: A Primer* ("*ACA Primer*") 2 (Jan. 2019) (internet).

(1) reside in a U.S. state or territory; and (2) are "lawfully present." 42 U.S.C. § 18032(f)(1)(A)(ii), (f)(3); 45 C.F.R. § 155.305(a)(1)-(3). For individuals purchasing health insurance through the ACA's exchanges, Congress also provided premium tax credits to help offset the cost of insurance. 26 U.S.C. § 36B. On a sliding scale, those with incomes up to 400% of the federal poverty line qualify for a tax credit. *See id.* § 36B(b)(3)(A)(i).

Providing lawfully present immigrants with access to affordable and comprehensive health insurance through the state-based marketplaces was a deliberate decision by Congress, one that proved transformational for immigrant communities across the country.[41] In the ACA, Congress expressly made exchange plans and premium tax credits available to any taxpayer who "is an alien lawfully present in the United States." 26 U.S.C. § 36B(c)(1)(B)(ii). The Congressional Budget Office expressly predicted that these provisions would result in the share of legal, non-elderly residents with health insurance rising to around 94%—a fact cited favorably by the ACA's supporters during the Senate's deliberations. *See* 155 Cong. Rec. 31,991 (2009) (Sen. Johnson).

The Proclamation undercuts Congress's goal of expanding health insurance coverage by deeming inadequate any health plan that utilizes the premium tax credits authorized by the ACA. *See* 84 Fed. Reg. at 53,992. That result cannot be squared with Congress's decision to provide access to the ACA's marketplaces—and to offer financial assistance for health insurance premiums to those with qualifying incomes—to all individuals who are lawfully present in the country. *See* 26 U.S.C. § 36B(b)(3)(A)(i).

The Proclamation purports to consider an unsubsidized health plan purchased through an exchange as qualifying coverage. But such consideration may be illusory for prospective immigrants

[41] In this respect, the ACA is broader than other federal programs, such as Medicaid, that impose a five-year waiting period before admitted immigrants qualify to receive benefits. *See* Kaiser Family Foundation, *Fact Sheet: Health Coverage of Immigrants* (Feb. 2019) (internet).

because the Proclamation creates a potential catch-22. Under the ACA, immigrants cannot utilize the ACA's exchanges (whether or not they receive tax credits) without establishing their residency and lawful presence. 42 U.S.C. § 18032(f)(1)(A)(ii); 45 C.F.R. § 155.305(a)(1)-(3). The Proclamation, however, precludes immigrants from obtaining residency and establishing their lawful presence (even if they otherwise meet all of the INA's requirements) without first demonstrating that they will have unsubsidized health insurance. In practice, the Proclamation may thus present an insurmountable barrier to entry for many immigrants who Congress specifically contemplated would enter the country and obtain health insurance through the ACA marketplaces.

B. By directing immigrants to purchase health insurance that does not comply with the Affordable Care Act, the Proclamation will increase costs and burdens on Amici States and Local Jurisdictions.

The Proclamation does more than simply make it difficult for immigrants to access the comprehensive and affordable coverage to which they are legally entitled. To satisfy the Proclamation, most immigrants subject to it will need to purchase minimal insurance plans that often do not fully cover the ACA's essential health benefits or provide for cost-sharing help to lower the costs of care for consumers. Immigrants will thus be left underinsured and at *greater* risk of incurring higher out-of-pocket medical costs, relative to those immigrants who have ACA-compliant plans purchased through an exchange. These higher costs will likely result in uncompensated care that will impose significant costs on Amici States and Local Jurisdictions.[42] The ACA made great

[42] *See* Jessica Schubel & Matt Broaddus, *Uncompensated Care Costs Fell in Nearly Every State as ACA's Major Coverage Provisions Took Effect* 1-3 (Ctr. On Budget & Policy Priorities, May 23, 2018) (internet).

strides in reducing uncompensated care, benefitting patients, hospitals, and state and local jurisdictions—which often must pay for the cost of uncompensated care.[43]

1. The Proclamation rests on the false premise that immigrants' uncompensated care costs burden our healthcare system.

The Proclamation assumes that immigrants lawfully present here financially burden our healthcare system by incurring uncompensated care costs that are passed on to American taxpayers. But this unsupported assumption, for which the Proclamation fails to provide any evidence, is false. In fact, immigrants' overall healthcare expenditures are generally one half to two thirds of the expenditures of U.S. born individuals, across all age groups.[44] And that number is even lower for recent, uninsured immigrants: that group incurs annual medical expenditures that are less than one fifth of the average medical expenditures for insured, non-recent immigrants.[45] Further, most uninsured people—regardless of immigration status—do not receive health services for free or at reduced charge; in 2015, only 27% of uninsured adults reported receiving free or reduced-cost care.[46] Overall, recent immigrants incur less than one tenth of 1% of total medical expenditures in the United States.[47] The Proclamation's factual premise is thus simply not true.

---

[43] *See id*. at 4-5.

[44] *See* Letter from the American Medical Association to President Donald J. Trump ("AMA Letter"), at 1 (Oct. 22, 2019) (internet).

[45] *See* Leighton Ku, *Assessing the Presidential Proclamation on Visas and Health Insurance*, Health Affairs (Dec. 17, 2019) (internet). "Recent" is defined as having been in the United States for less than five years. *See id.*

[46] *See ACA Primer*, *supra*, at 16.

[47] *Id.*

2. Forcing immigrants to purchase limited or temporary insurance plans will leave them underinsured and exposed to uncovered medical expenses.

In any event, the Proclamation is likely to undermine its own stated goal of reducing uncompensated care costs because the Proclamation will increase uncompensated care costs by directing immigrants away from comprehensive insurance coverage that will actually cover prescription medicines, hospital stays, and other critical medical expenses. Instead the Proclamation effectively requires immigrants to purchase non-ACA compliant plans such as short-term, limited duration insurance (STLDI), visitor's health insurance, or travel insurance, in order to satisfy the Proclamation's requirements.[48] These minimal insurance plans do not comply with the ACA, will leave immigrants underinsured, and are likely to lead to the uncompensated care costs that the Proclamation professes to address.

Given the legal and practical limitations of purchasing health insurance from abroad, STLDI may be one of the only insurance options theoretically available to immigrants before moving to the United States.[49] But STLDI plans would leave immigrants underinsured and *more* likely to incur uncompensated care costs. STLDI is non-comprehensive coverage that does not

[48] Travel insurance is designed for people visiting the United States temporarily, not for people intending to move here permanently. It is very limited insurance that usually pays a fixed amount for each covered service, regardless of the actual cost of such service. These plans thus do not provide coverage to immigrants for their foreseeable health needs. *See* Letter from Dania Palanker to U.S. Secretary of State Michael R. Pompeo, at 3-4 (Oct. 31, 2019) (internet).

[49] Other options ostensibly made available to immigrants under the Proclamation are effectively foreclosed too: Medicare requires five years of residency in the United States; family member plans cover only spouses and children under age 27; employer plans are typically unavailable to family members prior to arrival; catastrophic plans require residency here; and TRICARE plans available to only members of the military. *See Doe #1 v. Trump*, No. 19-cv-1743, 2019 WL 5685204, at *3-4 (D. Or. Nov. 2, 2019).

need to comply with the ACA's consumer protections. Such insurance is intended to fill temporary gaps in coverage when an individual is transitioning between insurance plans. In August 2018, however, the U.S. Department of Health and Human Services finalized a rule to greatly expand the use of short-term insurance. *See* Short Term, Limited-Duration Insurance, 83 Fed. Reg. 38,212 (Aug. 3, 2018). Previously limited to three months by federal law, STLDI plans can now last up to 36 months with renewals. *Id*. at 38,214-15. STLDI does not need to cover all ten essential health benefits,[50] or abide by the ACA's prohibitions on annual and lifetime benefit limits.[51] STLDI plans typically involve medical underwriting and thus exclude coverage of preexisting health conditions or charge exorbitant premiums to cover such conditions.[52] One recent analysis found that 43% of STLDI plans did not cover mental health services, 62% did not cover substance abuse treatment, 71% did not cover outpatient prescription drugs, and 100% did not cover maternity care.[53]

[50] The ACA requires all health plans to cover: (1) ambulatory patient services; (2) emergency services; (3) hospitalization; (4) maternity and newborn care; (5) mental health and substance use disorder services; (6) prescription drugs; (7) rehabilitative and habilitative services and devices; (8) laboratory services; (9) preventive and wellness services and chronic disease management; and (10) pediatric services, including oral and vision care. 42 U.S.C. § 18022(b)(1).

[51] *See* Linda J. Blumberg, Matthew Buettgens, & Robin Wang, *Updated Estimates of the Potential Impact of Short-Term, Limited Duration Policies* (Urban Inst. Health Policy Ctr., Aug. 2018) (internet).

[52] *See* Rachel Schwab, *Coverage That (Doesn't) Count: How the Short-Term, Limited Duration Rule Could Lead to Underinsurance* (Georgetown Univ. Health Policy Inst., July 30, 2018) (internet).

[53] *See* Kaiser Family Foundation, *Analysis: Most Short-Term Health Plans Don't Cover Drug Treatment or Prescription Drugs, and None Cover Maternity Care* (Apr. 23, 2018) (internet).

Given their limited coverage and lack of consumer protections, several States with large immigrant populations, such as New York and California, have banned STLDI coverage.[54] Many other states, such as Oregon, Colorado, Maryland, and New Mexico, and the District of Columbia, have restricted such plans to three or six months in length, with no extensions or renewals permitted.[55] Such plans do not meet the Proclamation's 364-day coverage requirement. STLDI plans thus may not be a viable insurance option both because of the limited nature of that coverage and because of the significant restrictions on where immigrants can purchase such coverage.

If the Proclamation goes into effect, immigrants will also likely be subjected to deceptive marketing and fraudulent health insurance products. Amici States and Local Jurisdictions may have to increase their regulatory oversight to protect consumers from such products.[56] Experts see the Proclamation "as an opportunity for those looking to prey on people applying for visas by either fraudulently selling what they claim to be is an insurance product or by selling subpar insurance products without disclosing the limitations of the plan." Decl. of Dania Palanker ¶ 37, *Doe #1 v. Trump*, No. 19-cv-1743 (D. Or. Nov. 8, 2019), ECF No. 57. And insurance products created to comply with the Proclamation may involve policy holders outside the United States, and thus beyond the reach of state insurance regulators altogether. *Id*. at ¶ 38. The proliferation of non-ACA compliant insurance that meets the Proclamation's health insurance requirement could

[54] *See* Dania Palanker, Maanasa Kona, & Emily Curran, *States Step Up to Protect Insurance Markets and Consumers from Short-Term Health Plans*, app. A (Commonwealth Fund, May 2019) (internet).

[55] *Id*.

[56] *See* Dania Palanker, JoAnn Volk, & Maanasa Kona, *Seeing Fraud and Misleading Marketing, States Warn Consumers About Alternative Health Insurance Products*, Commonwealth Fund (Oct. 30, 2019) (internet).

impair Amici's ability to properly regulate the individual insurance market, harm the risk pool of those markets, and increase uncompensated care costs.

3. Directing immigrants to purchase limited or temporary insurance may increase uncompensated care costs and harm insurance markets.

Directing immigrants to purchase insurance that does not comply with the ACA's consumer protections leaves those individuals exposed to uncovered medical expenses when undergoing routine medical services such as filling a prescription or seeking treatment for a preexisting health condition. And when neither the insurer nor the patient pays for that care, the result is uncompensated care costs that are ultimately borne by medical providers (such as hospitals and clinics) and by federal, state, and local governments like Amici. Overall, approximately 65% of uncompensated care costs are offset by government funds, and 36.5% of that governmental funding comes from state and local governments.[57]

Because of the ACA's comprehensive coverage reforms, state and local governments have saved billions of dollars in reduced uncompensated care costs. In 2013, before the ACA's major provisions went into effect, state and local governments spent approximately $19.8 billion on uncompensated care costs.[58] By 2015, when the ACA was fully implemented, nationwide hospital uncompensated care costs fell by about 30% on average, and in Medicaid expansion States that figure was roughly 50%.[59] State and local government budgets benefitted greatly as a result.

---

[57] *See* Teresa A. Coughlin, et al., *An Estimated $84.9 Billion In Uncompensated Care Was Provided In 2013; ACA Payment Cuts Could Challenge Providers* 33 Health Affairs 807, 811-13 (2014) (internet).

[58] *See* Teresa A. Coughlin, et al., *Uncompensated Care for the Uninsured in 2013: A Detailed Examination*, Kaiser Family Foundation (May 30, 2014) (internet).

[59] *See* Schubel & Broaddus, *supra*, at 1.

Directing hundreds of thousands of immigrants to purchase non-ACA compliant insurance threatens to increase the uncompensated care costs that the ACA sought to prevent, harming state and local budgets in the process.

The Proclamation is also likely to harm Amici's health insurance markets by negatively impacting the risk pool in each State. One of the ACA's key innovations was requiring insurers to treat all enrollees in the individual insurance market as "members of a single risk pool." 42 U.S.C. § 18032(c)(1). Such pooling allows insurance premiums to reflect the average level of risk of the entire market, rather than the cost of enrollees in a particular plan. But to function properly, a unified risk pool requires a mix of individuals who have greater and lesser healthcare needs.

Immigrants are generally younger and healthier than the insured population at large. Immigrants are also below-average users of healthcare goods and services. By diverting immigrants away from the individual market's single risk pool and into STLDI-type plans, the Proclamation is likely to make that risk pool less healthy, leading to increased insurance premiums for citizens and non-citizens alike. Indeed, the American Medical Association has warned that "the expansion of STLDI will ultimately undermine the individual insurance market and create an uneven playing field by luring away healthy consumers, thereby damaging the risk pool and driving up premiums for consumers left in the ACA-compliant market."[60]

Immigrants are more likely to represent "favorable" insurance risk when compared to the insured population at large. Several studies have concluded that immigrants are net contributors to both private coverage and Medicare, paying more in insurance premiums than they receive in

[60] *See* AMA Letter, *supra*, at 2.

benefits.[61] State exchange data confirm this trend. In Massachusetts, immigrant enrollees on the state exchange have, on average, 25% lower medical claims than citizen enrollees.[62] And in California, immigrant enrollees have 10% lower medical claims than citizen enrollees.[63]

Fewer immigrants in the ACA-compliant market will likely lead to a less healthy risk pool, which will result in commercial market premium increases for all healthcare users (citizens and non-citizens alike). And in some Amici States and Local Jurisdictions, the harm will extend beyond the individual market. Massachusetts, for example, has a "merged market" structure that combines the individual and small employer markets. Individuals and small businesses in Massachusetts share a risk pool, insurance products, and premiums. Both could experience premium increases from the Proclamation's exclusion of immigrants from the ACA-compliant market.[64] And higher premiums lead to higher uninsured rates for citizens and legal residents, thereby increasing the uncompensated care burden that the Proclamation purports to address.

* * * * *

The consular rules challenged here will preclude hundreds of thousands of immigrants from entering the country, reuniting with their families, and contributing to Amici's economies and communities. The rules will harm Amici States' and Local Jurisdictions' health insurance markets, increase our administrative and regulatory burdens, and impose uncompensated care costs on our public fiscs. The Court should issue a preliminary injunction to prevent such harms.

---

[61] *See*, *e.g.*, Letter from Louis Gutierrez, Executive Director, Massachusetts Health Connector to Edward J. Ramotowski, Deputy Assistant Secretary, Office of Visa Services, at 3 (Oct. 31, 2019) (internet).

[62] *Id.*

[63] Letter from Peter V. Lee, Executive Director, Covered California to Edward J. Ramotowski, Deputy Assistant Secretary, Office of Visa Services, at 3 (Oct. 31, 2019) (internet).

[64] *See* Letter from Louis Gutierrez, *supra*, at 3.

CONCLUSION

The Court should preliminarily enjoin application of the revisions to the Foreign Affairs Manual, adoption and implementation of the Interim Final Rule, and implementation of the Proclamation.

Dated: New York, New York
February 6, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General
State of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
KATHLEEN BOERGERS
SARAH E. BELTON
Supervising Deputy Attorneys General
SRIVIDYA PANCHALAM
MARISSA MALOUFF
NIMROD PITSKER ELIAS
Deputy Attorneys General
1515 Clay Street, Suite 2000
Oakland, CA 94612

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General

By: */s/ Judith N. Vale*
Judith N. Vale
Senior Assistant Solicitor General
28 Liberty Street
New York, NY 10005
(212) 416-8016

(Counsel listing continues on next page.)

PHIL WEISER
Attorney General
State of Colorado
Ralph L. Carr Judicial Building
1300 Broadway
10th Floor
Denver, CO 80203

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Avenue
Hartford, CT 06106

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

KATHLEEN JENNINGS
Attorney General
State of Delaware
Carvel State Building
820 N. French Street
Wilmington, DE 19801

KEITH ELLISON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

CLARE E. CONNORS
Attorney General
State of Hawai'i
425 Queen Street
Honolulu, HI 96813

AARON D. FORD
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

KWAME RAOUL
Attorney General
State of Illinois
100 W. Randolph Street
12th Floor
Chicago, IL 60601

GURBIR S. GREWAL
Attorney General
State of New Jersey
25 Market Street
Box 080
Trenton, NJ 08625

AARON M. FREY
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

HECTOR H. BALDERAS
Attorney General
State of New Mexico
408 Galisteo Street
Santa Fe, NM 87501

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North Ninth Street
Richmond, VA 23219

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

KARL A. RACINE
Attorney General
District of Columbia
One Judiciary Square
441 4th Street, NW
Washington, D.C. 20001

JAMES R. WILLIAMS
County Counsel
County of Santa Clara
70 W. Hedding Street
East Wing, 9th Floor
San José, CA 95110

JAMES E. JOHNSON
Corporation Counsel
City of New York
100 Church Street
New York, NY 10007

MARK A. FLESSNER
Corporation Counsel
City of Chicago
121 N. LaSalle Street
Room 600
Chicago, IL 60602

MICHAEL N. FEUER
City Attorney
City of Los Angeles
200 North Main Street
8th Floor
Los Angeles, CA 90012

BARBARA J. PARKER
City Attorney
City of Oakland
One Frank H. Ogawa Plaza
6th Floor
Oakland, CA 94612

MARCEL S. PRATT
City Solicitor
City of Philadelphia
1515 Arch Street
17th Floor
Philadelphia, PA 19102

PETER S. HOLMES
City Attorney
City of Seattle
701 Fifth Avenue
Suite 2050
Seattle, WA 98104