No. 19-17214

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, et al.,
Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants-Appellants.

AMICUS CURIAE BRIEF OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF APPELLEES AND AFFIRMANCE

[Filed with Consent of Parties. Fed. R. App. P. 29(a)(2).]

On Appeal from a Decision of the U.S.D.C. for Northern District of California,
Case No: 4:19-cv-04975-PJH, Hon. Phyllis J. Hamilton

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. Rules App. P. 26.1 and 29(a)(4)(A), undersigned counsel for amicus curiae make the following disclosures:

The California School Boards Association ("CSBA") is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local board governance and advocates on behalf of school districts and county offices of education. CSBA does not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10 percent or more of its stock.

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INTRODUCTION

In August 2019, the United States Department of Homeland Security ("DHS") amended its regulations prescribing how DHS will determine whether an alien applying for admission or adjustment of immigration status is inadmissible to the United States under section 212(a)(4) of the Immigration and Nationality Act ("INA") because he or she is likely at any time to become a public charge. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) ("Final Rule"). DHS's adoption of the Final Rule was arbitrary and capricious in violation of the Administrative Procedure Act ("APA") because it failed to consider important aspects of the problem—the interdependent relationship between the included and excluded in-kind benefits set forth in the Final Rule and the consequence of large scale disenrollment from these critical services on the public education system.

STATEMENT OF *AMICI CURIAE* INTEREST

The California School Boards Association ("CSBA") is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local board governance and advocates on behalf of school districts and county offices of education.

The Education Legal Alliance of the California School Boards Association ("Amicus") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local education agencies. The Education Legal Alliance represents CSBA's members by addressing legal issues of statewide concern to school districts and county offices of education. The Education Legal Alliance's activities include joining in litigation where the interests of public education are at stake.

In the instant case, Amicus represents the interests of its members and submits this brief to draw attention to the serious and foreseeable consequences that the Final Rule will have on public education generally, both within the State of California and nationwide. Amicus is interested in the direct and indirect administrative and financial burdens the Final Rule will have on its members.

Amicus has reviewed the parties' briefs and is familiar with the questions involved in this case and the scope of their presentation. Amicus believes that its brief will assist the Court in the following key ways: (1) by addressing relevant points and authorities that were either undiscussed or underdeveloped in the parties' briefing; (2) further distinguishing and clarifying the case law relied upon by the parties; and, (3) illuminating the practical and legal consequences of the Final Rule on school districts and county offices of education.

As an association of California public school districts, Amicus is uniquely positioned to highlight and discuss aspects of the Final Rule that pertain to education. Specifically, although the Final Rule outwardly reflects a policy of preserving access to in-kind educational services, it is apparent to Amicus that disenrollment from the in-kind benefits targeted by the Final Rule will indirectly undermine that very same policy—an issue unaddressed by appellee DHS in its rulemaking.

STATEMENT OF CONSENT TO FILE *AMICI CURIAE* BRIEF

Pursuant to Fed. R. App. P. 29(a)(2), Amicus submits this brief with the consent of all parties.

STATEMENT OF AUTHORSHIP AND FINANCIAL SUPPORT

Pursuant to Fed. R. App. P. 29(a)(4)(E), Amicus represents: (1) no party or counsel for a party authored this brief in whole or in part; (2) no party or counsel for a party made any monetary contribution intended to fund the preparation of this brief; and (3) no person other than Amicus, its members, or its counsel contributed money to fund this brief.

ARGUMENT

The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). To ensure that agency actions are reasonable and lawful, a court must conduct a "thorough, probing, in-depth review" of the agency's reasoning and a "searching and careful" inquiry into the factual underpinnings of the agency's decision. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971), abrogated on other grounds, *Califano v. Sanders*, 430 U.S. 99, 105 (1977). After undertaking that review, a court "shall" set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "'[A]rbitrary and capricious' review under the APA focuses on the reasonableness of an agency's decision-making *processes*." *CHW W. Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001). Agency action is invalid if the agency fails to give adequate reasons for its decisions, fails to examine the relevant data, or offers no "rational connection between the facts found and the choice made." *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). A rule is arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to

the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*. In adopting the Final Rule, DHS failed to consider several important aspects of the problems generated by the inexorable relationship between the included and excluded in-kind benefits set forth in the Final Rule and the corresponding social consequences of mass disenrollment from the in-kind benefits targeted by the Final Rule on the public education system and society in general.

A. The Final Rule Will Foreseeably Result in Mass Disenrollment from In-Kind Benefits

Overall, DHS acknowledges that the Final Rule will necessarily result in disenrollment from targeted in-kind benefits. DHS projects a "2.5% rate of disenrollment or foregone enrollment" among those individuals seeking to adjust their immigration status that will be subject to a public charge review for inadmissibility. 84 Fed. Reg. 41463 (Aug. 14, 2019). DHS estimates that the total population seeking to adjust their immigration status that will be subject to a public charge review for inadmissibility is about 382,264 people annually. *Id*. But the size of the impacted population is far greater than those directly targeted by the Final Rule.

DHS recognizes the potential chilling effects of the Final Rule—i.e., the "disenrollment impacts with respect to people who are not regulated by this rule" but "who erroneously believe themselves to be affected." 84 Fed. Reg. 41313

(Aug. 14, 2019). This population, potentially includes "24 million to 26 million aliens and their family members." 84 Fed. Reg. 41463 (Aug. 14, 2019). Correspondingly, in adopting the Final Rule, DHS adversely impacts a population 65 times larger than the population it seeks to directly regulate.

DHS does not appear to have acknowledged a related but potentially broader chilling effect resulting from the Final Rule—the disenrollment from in-kind benefits not targeted in the Final Rule under the mistaken belief that the receipt of such benefits are within the scope of the Final Rule. The estimated 24 to 26 million individuals discussed in DHS's response to public comments and who are potentially impacted by chilling effects from the Final Rule consists only of individuals residing with at least one non-citizen immigrant "where someone in that family has received one of the public benefits *named in the public charge rule*." "*Only Wealthy Immigrants Need Apply," How a Trump Rule's Chilling Effect Will Harm the U.S.*, Fiscal Policy Institute (Oct. 10, 2018) at 1, emphasis added, available at http://fiscalpolicy.org/wp-content/uploads/2018/10/US-Impact-of-Public-Charge.pdf. In other words, the study did not purport to estimate the additional chilling effect that will like occur as aliens mistakenly disenroll from in-kind benefits that are *not* targeted in the Final Rule in their effort to avoid future immigration related consequences. Thus, the total population, potentially impacted

by the Final Rule's chilling effects significantly exceed the 24 to 26 million individuals referenced in DHS's rulemaking comment responses.

DHS generally responded to comments about potential chilling effects by noting that many of these effects are the result of the impacted population's independent decision-making in electing to forego public in-kind benefits to which they may be entitled in order to avoid future immigration related consequences. *Id*. at 41312-13. This is undoubtedly true. But the fact that the Final Rule's impacts are the result of third party decision-making does not obviate DHS from its obligation to consider these impacts, particularly where the chilling effect is the "predictable effect of Government action on the decisions of third parties." Cf., *Dept. of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019).

Generally, DHS does not dispute these chilling effects will occur and responds by pointing to the difficulty in accurately predicting disenrollment impacts due to "data limitations" with respect to the affected population. *Id*. at 41313. But while it is understandably difficult to predict with any precision the specific breadth of the Final Rule's impact, it is not at all difficult to predict the general impact will be the significant and widespread disenrollment from in-kind benefits, both from those in-kind benefits targeted by the Final Rule and those that are not.

B. Foreseeable Consequences of Disenrollment from the In-Kind Benefits Targeted by the Final Rule

The natural consequence of large scale disenrollment from the in-kind benefits targeted in the Final Rule is predictable. Section 8 Housing Assistance under the Housing Choice Voucher Program, Section 8 Project-Based Rental Assistance, and the other forms of subsidized housing targeted by the Final Rule (collectively, "Section 8") are, by their very nature, need based. To the extent an individual eligible for Section 8 housing disenrolls from the program to avoid future immigration related consequences, there is a significantly increased likelihood of homelessness. Admittedly, many individuals that disenroll from Section 8 housing subsidies will not end up on the streets. But just as certain, many others will—particularly when viewed in the aggregate across the millions that DHS acknowledges fall into the impacted population. Similarly, the mass disenrollment from the Supplemental Nutrition Assistance Program ("SNAP") and Medicaid will certainly result in proportional increases in malnourishment and health problems among the affected population.

DHS acknowledges the increased financial burden that the Final Rule will impose on state and local entities that must grapple with the fallout from the Final Rule with respect to these serious issues. But the real cost of homelessness, hunger, and poor health is not measured in dollars, particularly within the context

of public education. And DHS has ignored these problematic consequences of its Final Rule.

C. DHS Failed to Consider the Cascading Consequences of Disenrollment from the Targeted In-Kind Benefits Set Forth in the Final Rule and Their Interdependence with Public Education and Broader Social Welfare Policies

Need based in-kind social welfare benefits work collectively as an interdependent patchwork. Through the Final Rule, DHS targets certain in-kind benefits (i.e., Section 8, SNAP, and Medicaid) knowing this will result in large scale disenrollment without addressing the non-financial impacts of disenrollment on other in-kind benefits, public education, as well as broader social welfare policies.

Homelessness has a devastating impact on a homeless child's educational opportunities. "Research shows that these students experience significant academic, social, and socio-emotional challenges, and that being homeless is associated with lower school achievement and increased risk of dropping out of school. In addition, students who experience high mobility and attend many different schools over the course of their education often slip academically with each move." (Press Release, *Education Department Releases Guidance on Homeless Children and Youth*, U.S. Dept. of Education (July 27, 2016), available at https://www.ed.gov/news/press-releases/education-department-releases-guidance-homeless-children-and-youth. Absent intervention with additional

resources, these students generally tend to fall further behind their peers. Setting aside the individual needs of homeless students, their inability to keep pace with the remainder of their classmates impedes academic progress of the entire class as teachers devote a disproportionate amount of time with struggling students. And because homeless students are more likely to drop out of school, this creates a cascading effect of consequences reflected in the School-to-Prison Pipeline. American Academy of Pediatrics, Comm. on School Health, *Out-of-School Suspension and Expulsion*, 112 Pediatrics: Journal of the American Academy of Pediatrics 1000 (Mar. 2013), available at https://pediatrics.aappublications.org/content/131/3/e1000; see also, Wald J. & Losen D., *Defining and Re-directing a School-to-Prison Pipeline*, 99 New Directions For Youth Development (Fall 2003).

Malnourishment and undernourishment are likewise an acute problem in the context of public education. For a majority of students eligible to receive breakfast or lunch under the Free and Reduced Price Meals under the National School Lunch Program ("NSLP"), eligibility is based primarily upon receipt of SNAP benefits. Otherwise, eligibility must be established with records demonstrating the applicant's need based upon income. See, 84 Fed. Reg. 41389-90 (Aug. 14, 2019). But, homeless students are less likely to have the income records necessary to determine income based eligibility for the NSLP. National Center for Homeless

Education, *Identifying Children and Youth in Homeless Situations* (Aug. 2017) at 2, available at https://nche.ed.gov/wp-content/uploads/2018/10/identification.pdf. Thus, while DHS purports to exclude NSLP benefits from the scope of the Final Rule, in practice, disenrolling from SNAP significantly increases the likelihood that a student will be unable to demonstrate the eligibility requirements for free meals at school. Thus, under the Final Rule, the students most in need of subsidized school meals are also the least likely to demonstrate that they qualify for them.

Poor health similarly retards academic development. Although the Final Rule exempts individuals under 21, the intricacies of the application of the Final Rule are certain to confuse the impacted population and result in decisions to forego medical services outside the scope of the Final Rule. Students that are not obtaining Medicaid are less likely to receive vaccinations. Yoo, et al., *Association Between Medicaid Reimbursement and Child Influenza Vaccination Rates*, 126 Pediatrics: Journal of the American Academy of Pediatrics 998 (2010). And while DHS has at least superficially considered this issue from a public health perspective, vaccinations are also necessary to enroll in public school, providing yet another unintended consequence of the Final Rule's application. See, Cal. Health & Safety Code § 120335(b).

Disenrollment from the in-kind services targeted in the Final Rule significantly increases the likelihood of poor health, hunger, and dropping out of school—depriving impacted students of a public education including, in many cases, the ability to learn English. Of course, English proficiency is yet another factor for consideration in a public charge determination. By disenrolling in critical in-kind benefits, the result is a downward spiral rendering that individual even less likely to meet other factors applicable in a public charge determination. DHS acknowledges that the Final Rule will predictably result in disenrollment from Section 8, SNAP, and Medicaid. However, DHS has failed to acknowledge how removal of these same subsidies freezes in place significant barriers to public education which, in turn, decreases an undocumented student's overall education, English proficiency, and health—all of which further reduce the student's prospects in conjunction with a public charge determination.

D. Impairment of Access to Public Education

In California, access to public education is a fundamental constitutional right. *Serrano v. Priest*, 5 Cal.3d 584, 608, 487 P.2d 1241 (Cal. 1971) ["We indulge in no hyperbole to assert that society has a compelling interest in affording children an opportunity to attend school"]. While federal courts have declined to afford education this constitutional protection, none seriously dispute its importance:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Board of Education, 347 U.S. 483, 493 (1954). For this reason, federal courts regard access to public education as a quasi-fundamental or vital interest. *Plyler v. Doe*, 457 U.S. 202, 244 (1982), *dissenting opn.*; see also *Association for Disabled Americans, Inc. v. Florida International University*, 405 F.3d 954, 957 (11th Cir. 2005).

"A special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students....Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming." *M. W. v. Panama Buena Vista Union Sch. Dist.*, 110 Cal. App. 4th 508, 517 (Cal. App. 5th Dist. 2003), citations omitted. California school districts and offices of education are neither inclined nor legally permitted to turn their back on undocumented students, some of its most vulnerable

charges. See, *Plyler v. Doe*, 457 U.S. 202 (1982) [state law depriving undocumented students access to public education violates the 14th Amendment].

> [T]he confluence of Government policies has resulted in "the existence of a large number of employed illegal aliens, such as the parents of plaintiffs in this case, whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural citizens and business organizations may wish to subject them.

Plyler v. Doe, 457 U.S. at 218.

The Final Rule facially appears to respect this critical service afforded to all students, regardless of their immigration status. But the foreseeable consequences of widespread disenrollment from the in-kind benefits targeted in the Final Rule will devastate the educational prospects of the impacted population. Disenrollment from Section 8, SNAP, and Medicaid will necessarily result in increased family mobility, poor health, and lack of food—three key barriers to success in school as recognized by the United States Department of Education. Anderson, et al., *An Evaluation of State Local Efforts to Serve the Educational Needs of Homeless Children and Youth* (1995). The predictable effects of the Final Rule undermine its own regulatory policy to exclude school-based services from the Final Rule's scope—an issue unaddressed by DHS.

E. The Cost to Public Education

When it comes to public education, every dollar counts. "[T]here can be no doubt that public education is among the state's most basic sovereign powers. Laws that divert limited educational funds from this core function are an obvious interference with the effective exercise of that power." *Wells v. One2One Learning Found.*, 39 Cal.4th 1164, 1194, 141 P.3d 225 (Cal. 2006), as modified (Oct. 25, 2006). Here, the Final Rule will predictably result in disenrollment from Section 8 subsidies, SNAP food supplements, and Medicaid—all of which are linked to an increased likelihood of missing school or dropping out of school. Because school districts are directly funded based on enrollment, there is corresponding decrease in funding for schools that are already underfunded. While DHS may have considered the increased financial burden on states and local entities, this is more than a financial burden because school districts across the country are already underfunded. There simply are no reserves to draw from. The real cost will be in programmatic and staffing cuts, curriculum reductions, and a loss of educational services—none of which were considered by DHS.

CONCLUSION

The Final Rule will harm public education. Amicus strongly supports affirmance of the District Court's injunction to the implementation of the Final Rule.

Respectfully submitted,

DATED: January 23, 2020

DANNIS WOLIVER KELLEY

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CERTIFICATE OF COMPLIANCE

PURSUANT TO NINTH CIRCUIT RULE 32(g)(1)
FOR CASE NO. 19-17214

I certify that:

This amicus brief complies with the length limits permitted by Ninth Circuit Rule 29(a)(5). The brief is 4111 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

DATED: January 23, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: January 23, 2020

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