IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.* *Plaintiffs,* v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.* *Defendants*.	No. 19-cv-07777 (GBD)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

On October 11, 2019, the Court issued a preliminary injunction against the Department of Homeland Security's final rule *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292 (Aug. 14, 2019) ("Rule"). *See* Mem. Decision and Order, ECF No. 110 ("PI Order"). The Court based its decision on a determination that promulgation of the Rule exceeded DHS's delegated authority and was arbitrary and capricious under the Administrative Procedure Act ("APA"). The Court also held that there is "at least a colorable argument" that the Rule "may violate the Rehabilitation Act." PI Order at 18. On January 27, 2020, the Supreme Court stayed this Court's injunction, necessarily finding both that Plaintiffs are not threatened with irreparable harm by application of the Rule and also that the Defendants are likely to succeed on the merits of the case. Previously, the Ninth Circuit Court of Appeals issued a detailed opinion concluding that the Rule falls well within the Executive Branch's discretion to interpret and implement the public charge inadmissibility provision in the Immigration and Nationality Act ("INA"). *City and Cty. of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). In light of the Supreme Court's Stay of Injunction, the Ninth Circuit's detailed ruling, and for the reasons discussed herein, Defendants respectfully submit that the Court should dismiss Plaintiffs' Complaint in full.

BACKGROUND

"Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes." 8 U.S.C. § 1601(1). "[T]he immigration policy of the United States [is] that aliens within the Nation's borders not depend on public resources to meet their needs." *Id*. § 1601(2)(A). Rather, aliens must "rely on their own capabilities and the resources of their families, their sponsors, and private organizations." *Id*. Relatedly, "the availability of public benefits [is] not [to] constitute an incentive for immigration to the United States." *Id*.

§ 1601(2)(B).

These statutorily enumerated policies are effectuated in part through the public charge ground of inadmissibility in the INA. With certain exceptions, the INA provides that "[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 [or the Secretary of Homeland Security] 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). An unbroken line of predecessor statutes going back to at least 1882 have contained a similar public charge inadmissibility ground, and those statutes have, without exception, delegated to the Executive Branch the authority to determine who constitutes a public charge for purposes of that provision. *See* Immigration Act of 1882, 47th Cong. ch. 376, §§ 1-2, 22 Stat. 214 ("1882 Act"); 1891 Immigration Act, 51st Cong. ch. 551, 26 Stat. 1084 ("1891 Act"); Immigration Act of 1907, 59th Cong. ch. 1134, 34 Stat. 898 ("1907 Act"); Immigration Act of 1917, 64th Cong. ch. 29 § 3, 39 Stat. 874, 876 ("1917 Act"); INA of 1952, 82nd Cong. ch. 477, section 212(a)(15), 66 Stat. 163, 183. Indeed, in a Report leading up to the enactment of the INA, the Senate Judiciary Committee emphasized that because "the elements constituting likelihood of becoming a public charge are varied, there should be no attempt to define the term in the law," and that the public charge inadmissibility determinations properly "rest[] within the discretion of" the Executive Branch. S. Rep. No. 81-1515, at 349 (1950).

In 1996, Congress enacted immigration and welfare reform statutes that bear on the public charge inadmissibility determination. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Division C of Pub. L. No. 104-208, 1110 Stat. 3009-546 (1996) strengthened the enforcement of the public charge inadmissibility ground in several ways. First, Congress instructed that, in making public charge inadmissibility determinations, "the

consular officer or the Attorney General shall at a minimum consider the alien's: (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills," 8 U.S.C. § 1182(a)(4)(B), but otherwise left in place the broad delegation of authority to the Executive Branch to determine who constitutes a public charge. IIRIRA also raised the standards and responsibilities for individuals who must "sponsor" an alien by pledging to provide support to maintain that immigrant at the applicable threshold for the period of enforceability and requiring that sponsors demonstrate the means to maintain an annual income at the applicable threshold. Contemporaneously, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996), restricted most aliens from accessing many public support programs, including Supplemental Security Income ("SSI") and nutrition programs. PRWORA also made the sponsorship requirements in IIRIRA legally enforceable against sponsors.

In light of the 1996 legislative developments, the legacy Immigration and Naturalization Service ("INS") started in 1999 to engage in formal rulemaking to guide immigration officers, aliens, and the public in understanding public charge inadmissibility and deportability determinations. *See Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28676 (May 26, 1999) ("1999 NPRM"). No final rule was ever issued, however. Instead, the agency adopted the 1999 NPRM interpretation on an interim basis by publishing *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999) ("Field Guidance"). The Field Guidance dramatically narrowed the public charge inadmissibility ground by defining "public charge" as an alien who is likely to become "primarily dependent on the government for subsistence," and by barring immigration officers from considering any non-cash public benefits, regardless of the value or length of receipt, as part of

public charge inadmissibility and deportability determinations. *See id.* at 28689. Under that standard, an alien receiving Medicaid (other than for institutionalization for long-term care), food stamps, and public housing, but not cash assistance, would have been treated as no more likely to become a public charge than an alien who was entirely self-sufficient.

The Rule revises this approach and adopts, through notice-and-comment rulemaking, a well-reasoned definition of public charge providing practical guidance to DHS officials making public charge inadmissibility determinations. DHS began by publishing a Notice of Proposed Rulemaking, comprising 182 pages of description, evidence, and analysis. *See Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114 (Oct. 10, 2018) ("NPRM"). The NPRM provided a 60-day public comment period, during which 266,077 comments were received. *See* Rule at 41297. After considering these comments, DHS published the Rule, addressing comments, making several revisions to the proposed rule, and providing over 200 pages of analysis in support of its decision. Among the Rule's major components are provisions defining "public charge" and "public benefit" (which are not defined in the statute), an enumeration of factors to be considered in the totality of the circumstances when making a public charge determination, and a requirement that aliens seeking an extension of stay or a change of status show that they have not received public support in excess of the Rule's threshold since obtaining nonimmigrant status. The Rule supersedes the Interim Field Guidance, establishing a new definition of public charge based on a minimum durational threshold for the receipt of public benefits. Under this "12/36 standard," a public charge is an alien who receives designated public benefits for more than 12 months in the aggregate within a 36-month period. *Id.* at 41297. Such "public benefits" are extended by the Rule to include an enumerated list of non-cash benefits: with some exceptions, an alien's participation in the Supplemental Nutrition Assistance Program ("SNAP"), Section 8 Housing Programs, Medicaid,

and Public Housing may now be considered as part of the public charge inadmissibility determination. *Id*. at 41501-02. The Rule also provides a non-exclusive list of factors for assessing whether an alien is likely at any time to become a public charge and explains how DHS officers should apply these factors as part of a totality-of-the-circumstances determination.[1]

STANDARD OF REVIEW

The Rule 12(b)(6) standard "require[s] that a complaint *support* the viability of its claims by pleading sufficient nonconclusory factual matter to set forth a claim that is plausible on its face." *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 253 (2nd Cir. 2014) (alteration in original). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Although a court must accept as true all of the allegations contained in a complaint, that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." *Harris v. Mills*, 572 F.3d 66, 72 (2nd Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).[2]

ARGUMENT

I. Plaintiffs Have Not Established Standing Or Ripeness

As the party invoking federal jurisdiction, Plaintiffs bear the burden of establishing standing, "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "To seek injunctive relief, a plaintiff must show that [it] is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to

[1] A correction to the Rule was published in the Federal Register on October 2, 2019. *See Inadmissibility on Public Charge Grounds; Correction* (2019), https://www.federalregister.gov/documents/2019/10/02/2019-21561/inadmissibility-on-public-charge-grounds-correction.

[2] Internal quotation marks are omitted throughout.

the challenged action . . . ; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The "threatened injury must be certainly impending to constitute injury in fact"; allegations of "possible future injury do not satisfy . . . Art. III." *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990). Where, as here, "the plaintiff is not [itself] the object of the government action," standing "is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562.

Plaintiffs' alleged injuries consist of potential future harms that, if they ever came to pass, would be spurred by decisions of third parties not before the Court. Here, the Rule governs DHS personnel and certain aliens. It "neither require[s] nor forbid[s] any action on the part of" Plaintiffs, *Summers*, 555 U.S. at 493, nor does it expressly interfere with any of their programs applicable to aliens. To be sure, Plaintiffs allege harms of (i) a theoretical economic impact that might arise should aliens choose to rely more on State and local services; (ii) speculation that a public health episode could occur should noncitizens choose to forgo health services altogether; and (iii) interference with certain administrative programs. *See, e.g.*, Compl. ¶¶ 180, 194, 213 (ECF No. 17). But none of these alleged harms would be sufficient to confer standing on any State or City Plaintiff.

Plaintiffs' purported economic harms from the possibility that certain aliens may unnecessarily choose to forgo *all* federal health and housing benefits (thereby resulting in greater reliance on state and local benefits) do not establish standing. *See, e.g.*, Compl. ¶¶ 213, 216. As an initial matter, this theory is inconsistent with Plaintiffs' assertion that immigrants will generally "forgo public assistance altogether," rather than just federal assistance. Compl. ¶ 182; Mem. in Supp. of Pls.' Mot. for Prelim. Inj. at 6, ECF No. 35 ("PI Mot.") (aliens will disenroll from "benefits that are beyond the express scope of the Final Rule"). Further, plaintiffs do not have

"standing to sue [in] situations where the chain of causation leading to damages" is "complicated by the intervening agency of third parties." *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 240 (2d Cir. 1999); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 414 (2013) (courts are "reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors"). For any Plaintiff to suffer a net-increase in public benefit expenditures (i) a material number of aliens must unnecessarily choose to forgo all federal health benefits (a result not required by the Rule); (ii) these aliens must then either apply for, and receive, additional state or local health benefits, or use emergency room services ultimately financed by the government; and (iii) the increased state or local expenses for these aliens must be greater than the costs they would have incurred for aliens who would have resided in the State, and consumed State and local resources, but for the Rule.[3] Plaintiffs' allegation that the Rule may harm their economies because fewer aliens may receive and then spend federal funds within their territories is equally speculative. Plaintiffs do not even allege that this speculative injury would noticeably affect their total state economies.

In its preliminary injunction order, the Court credited Plaintiffs' theory that they would bear greater health costs due to health epidemics, since "patients [would] avoid preventive care." PI Order, at 8. But like the alleged economic impacts, this allegation is too speculative to support standing—it turns on individual choices by aliens to forgo *all* federal health benefits and, as a result, contract and spread "communicable diseases," or otherwise cause a public health crisis. *See Clapper*, 568 U.S. at 410 (rejecting "highly attenuated chain" theory of standing).

The Court likewise credited Plaintiffs' alleged "programmatic costs" from changes to the

[3] This is distinct from New York's standing theory in *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). There, plaintiff did not rely on an elongated causal chain of independent third-party decisions. The Court noted that plaintiff relied on a single, "predictable" reaction to a new federal policy (lower census response rates) resulting in definitive injuries to the State itself. *Id.* at 2565-66.

public charge ground of inadmissibility. PI Order, at 8. Bureaucratic inconvenience occasioned by a change in federal policy, however, is insufficient to confer standing. *See, e.g.*, *Crane v. Johnson*, 783 F.3d 244, 253 (5th Cir. 2015) (rejecting government officials' claim that they have standing since DACA would require that them to "alter their current processes to ensure" compliance).

"Constitutional ripeness is a doctrine that, like standing, is a limitation on the power of the judiciary" and serves as another prerequisite of justiciability. *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 429 (2d Cir. 2013). Ripeness "prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it." *Id.* Here, the gravamen of Plaintiffs' claims is that individual aliens—not the Plaintiffs themselves—may be erroneously determined as "likely at any time to become a public charge" under the totality of the circumstances test set forth in the Rule. Plaintiffs' claims therefore present the precise circumstance in which ripeness precludes review: resolving questions about the application of "public charge" in the context of an "actual dispute" over application of that ground of inadmissibility is needed to avoid "constructing generalized legal rules" in a "vacuum." *Id.*; *see* 8 U.S.C. § 1252 (providing individuals who have a final order of removal from the United States based on a public charge determination an opportunity to file a petition for review before a federal court of appeals to contest the definition of public charge as applied to them).

Prudential ripeness also counsels against consideration of Plaintiffs' claims. This doctrine is "'an important exception to the usual rule that where jurisdiction exists a federal court must exercise it,' and allows a court to determine 'that the case will be better decided later.'" *In re MTBE Prods. Liability Litig.*, 725 F.3d 65, 110 (2d Cir. 2013). "In determining whether a claim is prudentially ripe," courts examine "whether the claim is fit for judicial resolution" and "whether

and to what extent the parties will endure hardship if decision is withheld." *Id*. Fitness is generally lacking where the reviewing court "would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). Here, Plaintiffs' claims are all premised on hypothesizing about the potential future applications of the Rule to individuals, speculation about the effects of the Rule on individual decision-making, and disagreement with DHS's predictions based on the available evidence. In such a context, "judicial appraisal . . . is likely to stand on a much surer footing in the context of a specific application" of the Rule, rather than "in a factual vacuum." *Derby & Co, Inc. v. Dep't of Energy*, 524 F. Supp. 398, 408 (S.D.N.Y. 1981) (internal quotations omitted).

In addition, withholding judicial consideration of Plaintiffs' claims will not cause them any significant hardship. With respect to the Plaintiffs bringing this case, the Rule "do[es] not create adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm," and therefore cannot serve as the basis for a ripe claim. *Ohio Forestry Ass'n*, 523 U.S. at 733. Instead, the harms alleged are possible cumulative side effects of third party individuals' decisions to take action not required by the Rule or the Plaintiffs' own decisions to spend money in response to the Rule, so they do not create a ripe facial challenge.

II. Plaintiffs Are Outside The Zone of Interests Regulated By The Rule

Plaintiffs' claims fail because they are outside the zone of interests served by the limits of the "public charge" inadmissibility provision in § 1182(a)(4)(A) and related sections. The "zone-of-interests" requirement limits the plaintiffs who "may invoke [a] cause of action" to enforce a particular statutory provision or its limits. *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 572 U.S. 118, 129-30 (2014). Under the APA, a plaintiff falls outside this zone when its "interests are . . . marginally related to or inconsistent with the purposes implicit in the statute." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987). This standard applies with equal force where, as here,

Plaintiffs seek to challenge the government's adherence to statutory provisions in the guise of an APA claim. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012).

Plaintiffs plainly fall outside the zone of interests served by the limits of the meaning of public charge in the inadmissibility statute. At issue in this litigation is whether DHS will deny admission or adjustment of status to certain aliens deemed inadmissible on public charge grounds. By using the term "public charge" rather than a broader term like "non-affluent," Congress ensured that only certain aliens could be determined inadmissible on the public charge ground. It is aliens improperly determined inadmissible, not States or a city, who "fall within the zone of interests protected" by any limitations implicit in § 1182(a)(4)(A) and § 1183, because they are the "reasonable—indeed, predictable—challengers" to DHS's inadmissibility decisions. *Patchak*, 567 U.S. at 227; *see* 8 U.S.C. § 1252 (providing individuals who have a final order of removal from the United States based on, *inter alia*, a public charge determination, an opportunity to file a petition for review before a federal court of appeals to contest the charge of removability, including the definition of public charge as applied to them). Plaintiffs' attenuated, alleged harms—downstream economic and health effects—are not even "marginally related" to those of an alien seeking to demonstrate that the "public charge" inadmissibility ground has been improperly applied to his detriment. *Cf. INS v. Legalization Assistance Proj.*, 510 U.S. 1301, 1304-05 (1993) (O'Connor, J., in chambers) (concluding that relevant INA provisions were "clearly meant to protect the interests of undocumented aliens, not the interests of organizations [that provide legal help to immigrants]," and that the fact that a "regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect"); *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d

897, 899 (D.C. Cir. 1996) (dismissing under zone-of-interests test a suit challenging parole of aliens into this country, where plaintiffs relied on incidental effects of that policy on workers).

In the preliminary injunction order, the Court noted that Plaintiffs' interests are "intertwined" with the interests of aliens who may be subject to the Rule. PI Order at 10. But Defendants are aware of no case law suggesting that a party may fall within a statute's zone-of-interests simply because it has some connection with another party directly impacted by the statute. Furthermore, Plaintiffs have not identified any injury within the public-charge statute's zone of interests because their purported interest is fundamentally at odds with the goal of that statute. The clear purpose of the public-charge statute is to protect federal and state governments from having to expend taxpayer resources to support aliens admitted to the country or allowed to adjust to lawful-permanent-resident status. The interest plaintiffs seek to further through this lawsuit—more widespread use of taxpayer-funded benefits by aliens—is thus diametrically opposed to the interests Congress sought to further through the public-charge inadmissibility statute.

III. The Court Should Dismiss Count One

Count One alleges that the Rule violates the APA by exceeding DHS's statutory authority. Compl. ¶¶ 263-71. Plaintiffs advance four theories: (1) the Rule's "public charge" definition is contrary to the "long-standing" and "well-settled meaning of that term," *id.* ¶ 266; (2) the Rule impermissibly considers an applicant's use of non-cash benefits programs, *id.* ¶ 267; (3) the Rule's "weighted circumstances test" targets applicants whom Congress never intended to consider public charges, *id.* ¶ 268; and (4) the Rule would permit DHS to apply the public-charge determination to "applicants seeking to adjust nonimmigrant visas and deprive them of a totality of circumstances inquiry," *id.* ¶ 269. Because none of these theories is sound, Count One does not state a plausible claim for relief and should be dismissed.

The Court's analysis of Count One is governed by the *Chevron* framework. *See San Francisco*, 944 F.3d at 790; *accord* PI Order at 11. Under *Chevron*, courts first ask whether the statute is clear. *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If so, "that is the end of the matter[,] for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Where there is ambiguity, however, courts defer to the agency's interpretation so long as it is reasonable. *Id.* at 843-44. Such deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

Respectfully, the question is not whether the Rule's current interpretation of "public charge" is novel. *Contra* PI Order at 13. Rather, the question is whether that interpretation—regardless of whether it has previously been adopted—is within the bounds of the statute. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("It suffices that the new policy is permissible under the statute [for *Chevron* purposes]."). As explained below, while the Rule may offer a "new definition," PI Order at 13, that definition nonetheless fits comfortably within the statutory term "public charge" as it has been interpreted over time.

A. The Rule's Definition of "Public Charge" Is Consistent With The Statute

As the Ninth Circuit recently held, the Rule's definition of "public charge" is well within the bounds of the statute. *San Francisco*, 944 F.3d at 799 ("We conclude that DHS's interpretation of 'public charge' is a permissible construction of the INA.").

The Ninth Circuit made four principal observations: (1) that the word "opinion" is classic "language of discretion," under which immigration "officials are given broad leeway"; (2) that "public charge" is neither a "term of art" nor "self-defining," and is thus ambiguous under *Chevron* as "capable of a range of meanings"; (3) that Congress set out five factors for consideration but

expressly did not limit officials to those factors, which gave officials "considerable discretion"; and (4) that Congress granted DHS the power to adopt regulations, by which "Congress intended that DHS would resolve any ambiguities in the INA." *Id.* at 791-92.

Following these observations and a comprehensive, detailed account of the history of the "public charge" provision, *id.* at 792-97, the Ninth Circuit had little trouble concluding either that "the phrase 'public charge' is ambiguous," *id.* at 798, or that "DHS's interpretation of 'public charge' is a permissible construction of the INA," *id.* at 799. The same result should follow here.

1. The Rule's Definition of "Public Charge" Is Consistent With The INA, Administrative Interpretations, And U.S. Immigration Policy

Related provisions of the INA illustrate that the receipt of public benefits, including non-cash benefits, is relevant to the determination of whether an alien is likely at any time to become a public charge. Congress expressly instructed that, when making a public charge inadmissibility determination, DHS "shall not consider any benefits the alien may have received," 8 U.S.C. § 1182(s), including various noncash benefits, if the alien "has been battered or subjected to extreme cruelty in the United States by [specified persons]," *id.* § 1641(c); *see also id.* §§ 1611-1613 (specifying the public benefits for which battered aliens and other qualified aliens are eligible). The inclusion of that provision prohibiting the consideration of a battered alien's receipt of public benefits presupposes that DHS will ordinarily consider the past receipt of benefits in making public charge inadmissibility determinations. *Cf. Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1844 (2018) ("There is no reason to create an exception to a prohibition unless the prohibition would otherwise forbid what the exception allows.").

In addition, Congress mandated that many aliens seeking admission or adjustment of status submit affidavits of support executed by sponsors to avoid a public charge inadmissibility determination. *See* 8 U.S.C. § 1182(a)(4)(C) (requiring most family-sponsored immigrants to

submit enforceable affidavits of support); § 1182(a)(4)(D) (same for certain employment-based immigrants), § 1183a (affidavit-of-support requirements). Aliens who fail to submit a required affidavit of support are inadmissible on the public charge ground by operation of law, regardless of their individual circumstances. *Id*. § 1182(a)(4). Congress further specified that the sponsor must agree "to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line," *id*. § 1183a(a)(1)(A), and it granted federal and state governments the right to seek reimbursement from the sponsor for "any means-tested public benefit" that the government provides to the alien during the period of enforceability, *id*. § 1183a(b)(1)(A); *see also id*. § 1183a(a) (affidavits of support are legally binding and enforceable contracts "against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit").

The import of the affidavit-of-support provision is clear: To avoid being found inadmissible on the public charge ground, an alien governed by the provision must submit an affidavit of support executed by a sponsor—generally the individual who filed the immigrant visa petition on the alien's behalf—who has agreed to reimburse the government for *any* means-tested public benefits the alien receives while the sponsorship obligation is in effect, even if the alien receives those benefits only briefly and only in minimal amounts. Congress thus provided that the mere *possibility* that an alien might obtain unreimbursed, means-tested public benefits in the future was sufficient to render that alien inadmissible on the public charge ground, regardless of the alien's other circumstances.

Moreover, since at least 1948, the Executive Branch has taken the authoritative position that an alien may qualify as a "public charge" for deportability purposes if the alien or the alien's sponsor or relative fails to repay a public benefit upon a demand for repayment by a government

agency entitled to repayment. *See Matter of B-*, 3 I. & N. Dec. 323, 326 (BIA 1948), *aff'd*, *id.* at 337 (A.G. 1948). Under that rubric, an alien can be subject to deportation on the public charge ground based on a failure to repay upon demand, regardless of whether the alien was "primarily dependent" on the benefits at issue. *See id.* Indeed, although the Attorney General and Board of Immigration Appeals concluded that the alien in *Matter of B-* was not deportable as a public charge because Illinois law did not allow the State to demand repayment for the care she received during her stay in a state mental hospital, the opinion makes clear that the alien would have been deportable as a public charge if her relatives had failed to pay the cost of the alien's "clothing, transportation, and other incidental expenses," because Illinois law made the alien "legally liable" for those incidental expenses. *Id.* at 327. That was so even though Illinois was not entitled to recover the sums expended for plaintiff's lodging, healthcare, and food. *See id.*

Finally, the Rule's definition of "public charge" is entirely consistent with Congress's codified statements of U.S. immigration policy. In its prior analysis of "Congress's Intent," PI Order at 13-14, the Court focused on certain failed legislative initiatives in 1996 and 2013. "Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute," because "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160, 170 (2001). As a result, "several equally tenable inferences may be drawn from such inaction." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

That is particularly true here. There is no indication that Congress believed the proposed definitions were fundamentally inconsistent with the statutory term "public charge." Congress did not "discard[]" the proposed definitions of public charge "in favor of other language" eventually enacted. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987). It did not adopt an alternate definition

in the 1996 legislation, which left the term undefined, and it enacted no legislation on the subject in 2013. *See San Francisco*, 944 F.3d at 798 ("[T]he failure of Congress to *compel* DHS to adopt a particular rule is not the logical equivalent of *forbidding* DHS from adopting that rule."). In addition, the legislative history of the 1996 proposal indicates that the proposal was dropped at the last minute because the President objected to the proposal's rigid definition of "public charge," as well as other provisions, and threatened to veto the bill unless changes were made. *See* H.R. Rep. No. 104-828, at 241; 142 Cong. Rec. S11872, S11881-82 (Sept. 30, 1996). Far from suggesting that Congress attributed an unambiguous meaning to the still-undefined term "public charge," these circumstances suggest that Congress acceded to the President's demands that the Executive Branch retain the discretion to define the term. *See San Francisco*, 944 F.3d at 798 n.15 ("If anything, this legislative history proves only that Congress decided not to constrain the discretion of agencies in determining who is a public charge.").

The circumstances surrounding the 2013 proposal's failure similarly do not support the inference that Congress would have viewed the Rule as an impermissible construction of the public-charge inadmissibility provision. The 2013 proposal was rejected by a Senate committee, S. Rep. No. 113-40, at 42 (2013), but Congress then failed to enact the bill the committee agreed on. The question of what significance to assign to a rejected committee proposal that formed a part of a bill subsequently rejected by the full Congress underscores the problems inherent in relying on unenacted legislation.

Finally, both the 1996 and 2013 proposals were significantly broader than the Rule: the 1996 proposal covered a similar amount of benefits usage within a period of seven years rather than three, *see* H.R. Rep. No. 104-828, at 138, 240-41, and the 2013 proposal included receipt of *any* amount of public benefits, S. Rep. No. 113- 40, at 42, 63. Even if Congress's failure to codify

those stricter standards were evidence of its understanding of the term "public charge" (which it is not), they would not support the conclusion that Congress rejected the Rule's narrower definition.

The Court's preliminary injunction order focused on failed legislation, but did not address the legislation that did pass. PI Order at 13-14. In PRWORA, for example, Congress reiterated our "national policy with respect to welfare and immigration." 8 U.S.C. § 1601. In relevant part, PRWORA provides: "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes." *Id.* § 1601(1). As a result, "[i]t continues to be the immigration policy of the United States that . . . aliens within the Nation's borders 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." *Id.* §§ 1601(2)-1601(2)(A). As the Ninth Circuit had no trouble concluding, "[r]eceipt of non-cash public assistance is surely relevant to 'self-sufficiency' and whether immigrants are 'depend[ing] on public resources to meet their needs.'" *San Francisco*, 944 F.3d at 799 (citing 8 U.S.C. § 1601(1)–(2)).

2. Early Definitions Support the Rule's Definition of "Public Charge"

The Rule's definition of "public charge" is also consistent with its historical statutory meaning. The term has always been understood as one that the Executive Branch could, in its discretion, interpret to encompass individuals partially or temporarily dependent on public support. Indeed, there is longstanding evidence that the term "[p]ublic charge means any maintenance, or financial assistance, rendered from public funds." Arthur Cook *et al.*, Immigration Laws of the U.S., § 285 (1929); *see also* 26 Cong. Rec. 657 (1894) (statement of Rep. Warner) (explaining that under the public charge inadmissibility ground, "[i]t will not do for [an alien] [to] earn half his living or three-quarters of it, but that he shall presumably earn all his living . . . [to] not start out with the prospect of being a public charge"). When Congress originally enacted the public charge ground of inadmissibility, the term "pauper," not "public charge," was in common use for a person

so impoverished they would be expected to be permanently dependent on public support. *See, e.g.*, Century Dictionary & Cyclopedia (1911) (defining "pauper" as "[a] very poor person; a person entirely destitute"); *see also Overseers of Princeton Twp. v. Overseers of S. Brunswick Twp.*, 23 N.J.L. 169, 172 (N.J. 1851) (treating "a pauper" and "a person likely to become chargeable" as two separate classes).

An 1828 dictionary defined "charge" as "[t]hat which is enjoined, committed, entrusted or delivered to another, implying care, custody, oversight, or duty to be performed by the person entrusted," or a "person or thing committed to anothers [sic] custody, care or management." *San Francisco*, 944 F.3d at 793 (citing "Charge," *Webster's Dictionary* (1828 Online Edition), http://webstersdictionary1828.com/Dictionary/charge). Another contemporary dictionary defined "charge" as "an obligation or liability." *Id.* (citing Stewart Rapaljb & Robert L. Lawrence, *Dictionary of American and English Law, With Definitions of the Technical Terms of the Canon and Civil Laws* 196 (Frederick D. Linn & Co. 1888)).

This definition was also reflected in contemporary judicial opinions. *See generally San Francisco*, 944 F.3d at 793 (citing *In re Day*, 27 F. 678, 681 (C.C.S.D.N.Y. 1886) (defining a "public charge" as a person who "can neither take care of themselves, nor are under the charge or protection of any other person"); *State v. The S.S. "Constitution"*, 42 Cal. 578, 584–85 (1872) (noting that those who are "liable to become a public charge" are "paupers, vagabonds, and criminals, or sick, diseased, infirm, and disabled persons"); *City of Alton v. Madison Cty.*, 21 Ill. 115, 117 (1859) (noting that a person is not a "public charge" if the person has "ample means" of support)). And it is reflected in more recent sources: both the 1933 and 1951 editions of Black's Law Dictionary defined the term "public charge," "[a]s used in" the 1917 Immigration Act, to mean simply "one who produces a money charge upon, or an expense to, the public for support

and care"—without reference to amount. *Public Charge*, Black's Law Dictionary (3d ed. 1933); Black's Law Dictionary (4th ed. 1951).

3. *Gegiow v. Uhl* and the Immigration Act of 1917

The original, broad meaning of "public charge" was not refuted or narrowed by the Supreme Court's decision in *Gegiow v. Uhl*, 239 U.S. 3 (1915), on which Plaintiffs rely for the proposition that the Supreme Court understood "public charge" in 1915 to mean "individuals who depend completely or nearly completely on government support." Compl. ¶ 28. *Gegiow* neither defined "public charge" nor foreclosed Defendants' interpretation of that term. At most, the case suggests that public charge inadmissibility determinations be based on an alien's personal characteristics—which is precisely the approach the Rule employs, *see* Rule at 41501 (mandating that individual public-charge inadmissibility determinations must be "based on the totality of the alien's [individual] circumstances").

In *Gegiow*, an immigration official found a group of aliens likely to become public charges, and thus denied them entry, solely because the city to which they were headed (Portland, Oregon) had few jobs available. 239 U.S. at 8-9. Thus, "[t]he single question" in the case was "whether an alien [could] be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." *Id.* at 9-10. The Supreme Court held that such a finding was improper for two reasons, neither relevant here.

The first was that, in the 1907 Immigration Act, the phrase "public charge" appeared within a list that included "paupers," "professional beggars," and "idiots," *id*. at 10. The Court observed that the other "persons enumerated" in the list were "to be excluded on the ground of permanent personal objections." *Id.* And thus it noted that "[p]resumably" the phrase "public charge" was "to be read as generically similar to the others." *Id.* But the close association of "public charge" with "paupers" and "professional beggars" was a feature peculiar to the 1907 Immigration Act, as

amended in 1910, not seen in statutes before or since, and which would later be undone expressly to overcome the *Gegiow* Court's misunderstanding of the term.

The Supreme Court's other ground for decision is likewise irrelevant here: the Court thought that "[i]t would be an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked." *Id*. at 10. Thus, when the Court referred to reliance on "permanent personal objections," it was contrasting an approach centered on the alien's own circumstances with an approach centered on general labor conditions. It would be implausible to attribute to that language, in that context, a holding that an individual alien who will rely on public resources for a significant period, but not necessarily indefinitely, may not be excluded as a public charge. Indeed, even the 1999 Guidance, which Plaintiffs seek to reinstate, did not reflect that meaning of the term.

Even if *Gegiow* had given the term "public charge" Plaintiffs' preferred definition, which it did not, that definition was fleeting at best. Shortly after the *Gegiow* decision, the Secretary of Labor sent a letter to Congress, requesting that the statute be amended to supersede the Supreme Court's ruling. *See* Letter from Sec. of Labor to House Comm. on Immig. and Naturalization, H.R. Doc. No. 64-886, at 3 (Mar. 11, 1916); NPRM at 51125. The Secretary defined "public charge" in accordance with its meaning at the time: as "a charge (an economic burden) upon the community" in which an alien intends to reside. The Secretary then explained that the Court's opinion in *Gegiow* had highlighted a never-before recognized "defect in . . . the arrangement of the wording," which, if left uncorrected, would "materially reduce[] the effect of the clause" in protecting the public fisc.

Congress agreed. The next year, it amended the Immigration Act to move the public-charge ground of inadmissibility toward the end of the list of exclusions, *see* 1917 Act § 3, so that the

Gegiow Court's mistaken inference about the phrase's placement in the list would be dispelled. That was how a Senate Report described the amendment: "The purpose of this change is to overcome recent decisions of the courts limiting the meaning of the description of the excluded class. . . . (See especially *Gegiow v. Uhl*, 239 U.S., 3.)." S. Rep. No. 64-352, at 5 (1916); *see also* H.R. Doc. No. 64-886, at 3-4 (1916); 1917 Act § 3 n.5; as reprinted in Immigration Laws and Rules of January 1, 1930 with Amendments from January 1, 1930 to May 24, 1934 (1935) (explaining that "[t]his clause . . . has been shifted . . . to indicate the intention of Congress that aliens shall be excluded upon said ground for economic as well as other reasons" and "overcoming the decision of the Supreme Court in *Gegiow*").

Courts subsequently recognized that the term "public charge" is "not associated with paupers or professional beggars." *Ex Parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923) (explaining that "public charge" in the 1917 Act "is differentiated from the application in *Gegiow*"); *see also United States ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929) (L. Hand, J.) (explaining that in the wake of the 1917 Immigration Act, the public-charge statute "is certainly now intended to cover cases like *Gegiow*"); Arthur Cook, Immigration Laws, §§ 128-34. *But see Ex Parte Mitchell*, 256 F. 229, 232 (N.D.N.Y. 1919) (declining to give effect to relocation of "public charge" within the 1917 Act).

* * *

Defendants easily clear the hurdle of *Chevron* step one. Congress has never defined "public charge," let alone foreclosed the interpretation adopted in the Rule. Instead, Congress has repeatedly and intentionally left the definition and application of the term to the discretion of the Executive Branch. *See San Francisco*, 944 F.3d at 796-97 (finding that "'public charge' does not have a fixed, unambiguous meaning" and that "[i]t is apparent that Congress left DHS and other

agencies enforcing our immigration laws the flexibility to adapt the definition of 'public charge' as necessary"). Here, the Rule gives the statute its most natural meaning by specifying that an alien who depends on public assistance for necessities such as food and shelter for extended periods may qualify as a public charge even if that assistance is not provided through cash benefits or does not provide the alien's sole or primary means of support.

Defendants also prevail at *Chevron* step two, at which the Court "ask[s] whether the agency's interpretation of the statute is reasonable." PI Order. at 11. The Ninth Circuit held that the Rule "easily satisfies this test." *San Francisco*, 944 F.3d at 799. Because the Rule adopts a reasonable interpretation of the statutory provision, Plaintiffs cannot succeed on their theory that the Rule's definition of "public charge" exceeds DHS's statutory authority.

B. The Weighted-Circumstances Test Is Also Consistent With the Statute

The ostensibly separate ground for finding the Rule contrary to law is, in reality, a reformulation of the preceding argument. Plaintiffs' allegation, at bottom, is that the weighted-circumstances test sweeps in persons who are not "likely to become permanently and primarily dependent on the government for support." Compl. ¶ 157-59.[4] But of course, that is *Plaintiffs'* definition of "public charge." And as detailed at length above, that has never been the statutory definition. More importantly, the Rule's broader definition of "public charge," to include those who are not permanently and primarily dependent on the government, is within the bounds of the statute. Because this theory is premised entirely on Plaintiffs' preferred definition of "public charge," which has been rebutted above, it should be rejected for the same reasons.

C. The Public Charge Statute Does Not Require That Government Benefits Be Paid In Cash

[4] Plaintiffs separately allege that the weighted-circumstances test is discriminatory, arbitrary, and capricious. Those allegations are addressed elsewhere.

Plaintiffs further allege in Count One that the Rule impermissibly mandates consideration of non-cash benefits programs. Compl. ¶ 267. This theory, too, fails to state a plausible claim.

The Ninth Circuit had no difficulty disposing of this same question: "We see no statutory basis from which a court could conclude that the addition of certain categories of in-kind benefits makes DHS's interpretation untenable." *San Francisco*, 944 F.3d at 799. That court emphasized that PRWORA set forth a "national policy with respect to welfare and immigration," which policy includes in pertinent part: "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes." *Id.* (quoting 8 U.S.C. §§ 1601, 1601(1)). "PRWORA thus lends support to DHS's interpretation of the INA," which "is a permissible construction of the INA." *San Francisco*, 944 F.3d at 799. This Court should agree.

Nothing in the meaning of "public charge" suggests a distinction between non-cash benefits and services and "cash assistance," as Plaintiffs allege. *Compare* Compl. ¶ 129 ("As the relevant statutory language, history, case law, and long-standing agency practice demonstrate, Congress never intended that an immigrant's lawful receipt of non-cash supplemental benefits be used to render a public charge determination."); *with San Francisco*, 944 F.3d at 799 ("We see no statutory basis from which a court could conclude that the addition of certain categories of in-kind benefits makes DHS's interpretation untenable."). Both types of assistance create an obligation on the part of the public, and both equally relieve recipients from the conditions of poverty. And, as discussed above, Congress's instruction that DHS not consider benefits received by a battered alien indicates that Congress expected DHS to consider past receipt of benefits, including noncash benefits, in other circumstances. *See* Section III(A)(1) *supra*.

D. DHS's Interpretation Is Reinforced By Congress's Unequivocal, Longstanding Delegation Of Authority To The Executive Branch

For the foregoing reasons, the Rule's definition of "public charge," including the application of a weighted-circumstances test and consideration of non-cash benefits, is well within the statute's ambit. But the Court's analysis is made easier by the undisputed, expressed, and consistent delegation of authority by Congress to the Executive in this sphere. Indeed, this was the Ninth Circuit's foremost conclusion when examining the statute. *See San Francisco*, 944 F.3d at 791 ("First, the determination is entrusted to the 'opinion' of the consular or immigration officer. That is the language of discretion, and the officials are given broad leeway.") (footnote omitted). The Ninth Circuit also relied on the fact that "Congress granted DHS the power to adopt regulations to enforce the provisions of the INA," and thereby "intended that DHS would resolve any ambiguities in the INA." *Id.* at 792 (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016)).

The Ninth Circuit was right. The statutory term "public charge" has "never been [explicitly] defined by Congress in the over 100 years since the public charge inadmissibility ground first appeared in the immigration laws." Rule at 41308. Congress implicitly delegates interpretive authority to the Executive Branch when it omits definitions of key statutory terms, thereby "commit[ting] their definition in the first instance to" the agency, *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981), to be exercised within the reasonable limits of the meaning of the statutory term, *Chevron*, 467 U.S. at 844. Congress has long recognized this implicit delegation of authority to interpret the meaning of "public charge." *See, e.g.*, S. Rep. No. 81-1515, at 349 (1950) (stating that because "there is no definition of the term [public charge] in the statutes, its meaning has been left to the interpretation of the administrative officials and the courts"). This delegation is reinforced by Congress's directive that the determination be made "in the opinion of the

Attorney General [or Secretary of Homeland Security]" or a "consular officer." 8 U.S.C. § 1182(a)(4)(A). The expansive delegation of authority by Congress grants DHS wide latitude to interpret "public charge" within the reasonable limits set by the broad meaning of the term itself.

This delegation is reinforced by the explicit overall delegation of authority by Congress to the Secretary of Homeland Security to "establish such regulations . . . as he deems necessary for carrying out" the INA. *San Francisco*, 944 F.3d at 782 (citing 8 U.S.C. § 1103(a)(1) & (a)(3)). Congress has also provided the Secretary with specific responsibility to carry out the INA and to make public charge inadmissibility decisions, as spelled out in detail in the NPRM and Rule. *See* NPRM at 51124; Rule at 41295.

Congress's comprehensive delegation of interpretive authority has been recognized in precedent dating back to the early public charge statutes. *See, e.g.*, *Ex Parte Pugliese*, 209 F. 720, 720 (W.D.N.Y. 1913) (affirming the Secretary of Labor's authority "to determine [the] validity, weight, and sufficiency" of evidence going to whether an individual was "likely to become a public charge"); *Wallis v. U.S. ex rel. Mannara*, 273 F. 509, 510 (2d Cir. 1921) (deference required even if "evidence to the contrary [is] very strong"). It is also recognized in Executive Branch practice. Administrative decisions have explained that Congress's broad delegation of authority in this area was necessary because "the elements constituting likelihood of becoming a public charge are varied." *Matter of Harutunian*, 14 I. & N. Dec. 583, 588-90 (INS Reg'l Comm'r 1974) (quoting S. Rep. No. 81-1515 at 349 (1950) (holding that alien's receipt of "old age assistance benefits" in California was sufficient to render the alien a "public charge")); *see also Matter of Vindman*, 16 I. & N. Dec. 131, 132 (INS Reg'l Comm'r 1977) (citing regulations in the visa context, and explaining that the "elements constituting likelihood of an alien becoming a public charge are varied . . . [and] are determined administratively").

The long history of congressional delegation of definitional authority over the meaning of "public charge" demonstrates the error in Plaintiffs' claim that Congress has "repeatedly rejected efforts to expand public charge." Compl. ¶¶ 37-42. That history cuts in precisely the opposite direction. By its inaction, Congress left the definition of "public charge" to the Executive Branch. *See San Francisco*, 944 F.3d at 797 ("If this legislative history is probative of anything, it is probative only of the fact that Congress chose *not* to codify a particular interpretation of 'public charge.'"). In no event could this inaction be read as a *withdrawal* of the longstanding delegation to the Executive Branch to exercise definitional authority over the "varied" elements of the meaning of "public charge." S. Rep. No. 81-1515, at 349; *see also San Francisco*, 944 F.3d at 798 ("And no change to § [1182] means that consular officers, the Attorney General, and DHS retain all the discretion granted them in the INA."). Certainly the INS, when it adopted the 1999 Field Guidance and proposed to issue a sweeping new definition of "public charge" through notice-and-comment rulemaking in 1999, did not understand Congress's 1996 action to have altered the statute by withdrawing the long-understood delegation. *See* 1999 NPRM at 28677 ("[T]he proposed rule provides a definition for the ambiguous statutory term 'public charge.'").

At a minimum, the likelihood that Congress intended to preserve the delegation means that, under the circumstances, "[c]ongressional inaction lacks persuasive significance" because competing "inferences may be drawn from such inaction." *Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 863 F.3d 911, 917 (D.C. Cir. 2017). And the more plausible of the competing inferences is that Congress intended for DHS to retain the authority delegated to it to analyze the "totality of the alien's circumstances" to make "a prediction" about the likelihood that an alien will become a public charge, *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974), including the delegated

authority for DHS to adopt further procedures to guide its officers, aliens, and the public at large in understanding the application of the public charge ground of inadmissibility.

E. DHS Has Statutory Authority to Impose Public-Benefits Conditions on Applications by Nonimmigrants for Extensions or Status Changes

Plaintiffs' final contrary-to-law theory also fails. *See* Compl. ¶ 269 ("The Final Rule further exceeds Defendants' statutory authority because the Final Rule would permit Defendants to apply the public charge determination to applicants seeking to adjust nonimmigrant visas and deprive them of a totality of circumstances inquiry."); *id.* ¶¶ 133-37.

First, DHS is *not* imposing a public-charge determination on nonimmigrants who seek to extend their visas or change their statuses. *See generally* Rule at 41329. Rather, DHS is setting a new condition for approval of extension-of-stay and change-of-status applications by nonimmigrants. Although that condition requires such an applicant to establish that he has not received more than 12 months of public benefits in a 36-month period since obtaining his nonimmigrant status, that is manifestly not a public-charge determination—which only applies to immigrants and which imposes other statutory considerations. *See* 8 U.S.C. § 1182(a)(4).[5] In fact, DHS removed a prospective element of the public-benefits condition specifically because such an element "might have been similar to a public charge inadmissibility assessment." Rule at 41329. At bottom, the Rule imposes a condition of approval, not a public-charge determination, on nonimmigrant visa holders.

Second, DHS has ample statutory authority to impose such conditions. *See* Rule at 41329 (citing 8 U.S.C. §§ 1184, 1258). DHS governs by regulation "[t]he admission to the United States of any alien as a nonimmigrant." 8 U.S.C. § 1184(a)(1). But DHS's role does not end upon the

[5] Ironically, if DHS acceded to Plaintiffs' demand that requests by nonimmigrants be examined under a "totality of the circumstances," Compl. ¶¶ 135-36, that would more closely resemble the very public-charge-inadmissibility analysis that they say is forbidden. *See* 8 U.S.C. § 1182(a)(4).

nonimmigrant's admission; DHS also governs how long, and under what conditions, the nonimmigrant can stay, *id.*, or change nonimmigrant statuses, *id.* § 1258.[6] And because it is national policy "that aliens *within the Nation's borders* not depend on public resources to meet their needs," *id.* § 1601(2)(A) (emphasis added), it is reasonable and consistent with the statute that DHS require, as a condition of obtaining an extension of stay or change of status, evidence that nonimmigrants inside the United States have remained self-sufficient during their stay.

* * *

Because all four theories on which Plaintiffs allege that the Rule is contrary to law are baseless, Count One should be dismissed for failure to state a plausible claim.

IV. The Court Should Dismiss Count Two

Count Two alleges that the Rule is contrary to law under the APA. For the reasons stated below, Plaintiffs fail to state a claim for which relief may be granted as to violation of the Rehabilitation Act of 1973, PRWORA, and the Supplemental Nutrition Aid Program ("SNAP"), and each claim should be dismissed.

A. The Rehabilitation Act

Plaintiffs contend that the Final Rule "conflicts with Section 504 of the Rehabilitation Act, which provides that no individual with a disability 'shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity[.]'" Compl. ¶ 274. In its PI Order, the Court held that Plaintiffs raised "at least a colorable argument that the Rule as to be applied may violate the Rehabilitation Act," because the Rule "clearly considers disability a negative factor in the public

[6] If a nonimmigrant is eligible and applies for legal permanent residency, then the public-charge inadmissibility determination would apply under 8 U.S.C. § 1182(a)(4). This again illustrates the difference between the public-benefits condition imposed on changes among *nonimmigrant* statuses under 8 U.S.C. § 1258 and a true public-charge determination under § 1182(a)(4).

charge assessment," and "do[es] not explain how disability alone is itself a negative factor indicative of being more likely to be a public charge." PI Order at 18. Critically, however, the requirement of § 504 is premised on the denial of services or discrimination "*solely* by reason of . . . disability." 29 U.S.C. § 794(a) (emphasis added). The fact that disability may constitute one factor to be considered in the totality of the circumstances does not run afoul of § 504. Both the Ninth Circuit and the Northern District of California rejected this same Rehabilitation Act argument in their decisions concerning preliminary injunction of the Final Rule. *San Francisco*, 944 F.3d at 799-800 (reversing the Eastern District of Washington's holding that the Final Rule was inconsistent with the Rehabilitation Act); *City & Cty. of San Francisco v. USCIS*, Case No. 19-4717, 2019 U.S. Dist. LEXIS 177379, at *111-12 (N.D. Cal. Oct. 11, 2019) (reversed in part on other grounds by *San Francisco*, 944 F.3d 773 (9th Cir. 2019)).

Both of these courts concluded that the plaintiffs in those cases had no likelihood of success on the merits of their Rehabilitation Act claims because: (1) the INA specifically directs federal immigration authorities to consider "health" in making public charge determinations. *San Francisco*, 944 F.3d at 800; *San Francisco*, 2019 U.S. Dist. LEXIS 177379 at *111-12; and (2) disability cannot be the sole reason for a denial of adjustment of status under the Rule's totality of the circumstances test. For the same reasons, Plaintiffs' claim based on the Rehabilitation Act fails.

First, the INA explicitly lists "health" as a factor that an officer "shall . . . consider" in making a public charge determination. 8 U.S.C. § 1182(a)(4)(B)(i). "Health" certainly includes an alien's medical conditions, and it is therefore Congress, not the Rule, that requires DHS to take this factor into account. *See, e.g., In Re: Application for Temporary Resident Status*, 2009 WL 4983092, at *5 (USCIS AAO Sept. 14, 2009) (considered application for disability benefits in public charge inquiry). A specific, later statutory command, such as the INA's, supersedes section

504's general proscription to the extent the two are in conflict, which they are not. *See San Francisco*, 944 F.3d at 800.

Second, the Rule is fully consistent with § 504. Plaintiffs' complaint does not even allege that disability can be the *sole* reason for denial of adjustment of status under the Rule. Even if they had made that claim, however, it is clear on the face of the Rule that the Rule does not deny any alien admission into the United States, or adjustment of status, "solely by reason of" disability. *San Francisco*, 944 F.3d at 800. All covered aliens, disabled or not, are subject to the same inquiry: whether they are likely to use one or more covered federal benefits for the specified period of time. Although an alien's medical condition is one factor (among many) that may be considered, it cannot be dispositive, and is relevant only to the extent that an alien's particular medical condition tends to show that he is "more likely than not to become a public charge" at any time. Rule at 41368; *see also San Francisco*, 2019 U.S. Dist. LEXIS 177379 at *111. Further, any weight assigned to this factor may be counterbalanced by other factors, including "[an] affidavit of support," "employ[ment]," "income, assets, and resources," and "private health insurance." *Id.* Thus, any public charge determination cannot be based "solely" on an applicant's disability.

B. SNAP

Plaintiffs also fail to state a claim that the Rule violates the SNAP statute because the Rule does not consider SNAP benefits as "income or resources." 7 U.S.C. § 2017(b). Section 2017(b) provides that:

> The *value of benefits* that may be provided under [SNAP] shall not be considered income or resources for any purpose under any Federal, State, or local laws, including, but not limited to, laws relating to taxation, welfare, and public assistance programs, and no participating State or political subdivision thereof shall decrease any assistance otherwise provided an individual or individuals because of the receipt of benefits under this chapter.

7 U.S.C. § 2017(b) (emphasis added). The context of this full version, rather than the abbreviated quotation relied on by Plaintiffs, reveals the error in Plaintiffs' argument. The Rule does not consider the "value" of SNAP benefits as "income or resources," only the *fact of receipt*. Indeed, the Rule specifically prohibits including the amount of SNAP benefits received in the computation of income or assets. *See* Rule at 41375 ("The rule explicitly excludes the value of public benefits including SNAP from the evidence of income to be considered" and "[a]ssets and resources do not include SNAP benefits"). Nothing in § 2017(b) precludes consideration of the fact of receipt of SNAP benefits by other statutes or regulations. *See, e.g.*, 47 C.F.R. § 54.409 (providing eligibility for consumer telephone or Internet subsidies based on fact of receipt of SNAP benefits). Therefore, the Rule does not violate § 2017(b) and Plaintiffs cannot state a claim.

C. PRWORA

Plaintiffs also contend that the Rule "conflicts with Welfare Reform Act, which provides that 'a State is authorized to determine the eligibility of an alien . . . for any designated Federal program.' 8 U.S.C. § 1612(b)(1)." Compl. ¶ 276. However, the Rule's consideration of receipt of public benefits, as defined by the Rule, does not limit or prohibit aliens' entitlement to such benefits or alter states' authority to determine aliens' eligibility. Rather, the Rule directs immigration authorities to consider whether aliens have used such benefits as part of the totality-of-the-circumstances analysis required by 8 U.S.C. § 1182(a)(4)(B). *See* Rule at 41365-66. Although individual aliens may choose, for a variety of reasons related or unrelated to the Rule, not to access certain benefits to which they are entitled, the Rule does nothing to alter the nature or extent of that entitlement or States' authority to administer those programs, and there is therefore no conflict between the Rule and PRWORA. Because there is no set of facts under which the

Rule's post hoc consideration of the use of benefits can actually change any qualified alien's[7] legal entitlement to access those benefits or States' authority related to them, Plaintiffs cannot state a claim that the Rule is contrary to PWRORA.

V. The Court Should Dismiss Count Three

Count Three of Plaintiffs' Complaint alleges that the Rule is arbitrary and capricious in violation of the APA for various reasons. *See* Compl. ¶¶ 279-89. Count Three should be dismissed because none of the theories alleged in the Complaint plausibly suggest the Rule is arbitrary or capricious.

A. The Rule Meets The Standards Required For An Agency To Change Its Position Through Notice-and-Comment Rulemaking

Plaintiffs allege that the Rule is arbitrary and capricious because DHS "failed to reasonably justify their departure" from past practice regarding the definition of "public charge." Compl. ¶ 282. But the "fact that DHS has changed policy does not substantially alter the burden in the challengers' favor." *San Francisco*, 944 F.3d at 801. It is well-settled that there is "no basis in the Administrative Procedure Act . . . for a requirement . . . [of] more searching review" when an agency changes its position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). And there is certainly no basis to find that the agency's prior interpretation in nonbinding guidance could possibly foreclose DHS from adopting a different reasonable interpretation through notice-and-comment rulemaking. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). As the Supreme Court explained in *Fox*, all that DHS was required to do to permissibly change course from the 1999 Field Guidance was to acknowledge that the Rule is adopting a policy change, provide a reasoned explanation for the change, and explain how it

[7] Plaintiffs' claim also ignores that many of the "qualified aliens" to whom PRWORA's authorization of certain public benefits applies are generally not subject to the public charge ground of inadmissibility. *See* 8 U.S.C. § 1641(b) ("qualified alien" includes, *inter alia*, asylum recipients and refugees).

believes the new interpretation is reasonable. *See Fox*, 556 U.S. 514-16. The Rule readily meets these standards, and so DHS is entitled to full deference to its changed interpretations, consistent with its obligation to "consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64 (recognizing agencies receive deference to a "changed . . . interpretation of [a] term").

First, the NPRM and Rule acknowledged that DHS was changing course. In the former, DHS announced it was proposing "major changes," *see, e.g.*, NPRM at 51116, and that these changes included "a new definition of public charge," *id.* at 51158; *see also id.* at 51163. DHS also stated that it would change and "improve upon the 1999 Interim Field Guidance" by changing the treatment of non-cash benefits. *Id.* at 51123. In the Rule, DHS "agree[d] with commenters that the public charge inadmissibility rule constitutes a change in interpretation from the 1999 Interim Field Guidance," Rule at 41319, and repeatedly explained that it was "redefin[ing]" public charge, and adopting a "new definition" of "public benefit" that would be "broader" than before. *Id.* at 41295, 41297, 41333; *see also id.* at 41347.

Second, DHS explained the reasons for the change. DHS described how the "focus on cash benefits" in the 1999 Field Guidance had proved "to be insufficiently protective of the public budget, particularly in light of significant public expenditures on non-cash benefits." NPRM at 51164. DHS presented statistics that reasonably support DHS's conclusion that, under the 1999 Field Guidance, the agency was failing to carry out the principles mandated by Congress that "aliens . . . not depend on public resources to meet their needs," and instead "rely on their own capabilities" and support from families, sponsors, and private organizations. 8 U.S.C. § 1601; *see also* NPRM at 51160-63 & Tables 10-12; Rule at 41308, 41319 (explaining that the prior guidance "failed to offer meaningful guidance for purposes of considering the mandatory factors and was

therefore ineffective").

DHS also adequately explained how the new approach reasonably advances the stated purposes, including by "implement[ing] the public charge ground of inadmissibility consistent with . . . [Congress's goal of] minimiz[ing] the incentive of aliens to attempt to immigrate to, or to adjust status in, the United States due to the availability of public benefits." Rule at 41305 (citing 8 U.S.C. § 1601(2)(B)). Accordingly, the fact that the Rule presents a revised interpretation does not render it arbitrary or capricious. *See San Francisco*, 944 F.3d at 804-05.

Relatedly, Defendants respectfully disagree with this Court's conclusion that the Rule is arbitrary because it "change[d] the public charge assessment into a *benefits* issue, rather than an inquiry about *self-subsistence*[.]" PI Order at 15. Self-subsistence is merely the converse of reliance on public benefits, as Congress itself averred. It was thus rational for DHS to conclude that aliens who rely on the public benefits enumerated in the Rule for months at a time are aliens who "depend on public resources to meet their needs," 8 U.S.C. § 1601(2)(A), and are not "self-sufficien[t]," *id*. § 1601(1). Even the 1999 Field Guidance tied the definition of public charge to the receipt of public benefits. Field Guidance at 28689. The Rule simply redefines what benefits received over what time period qualify an alien as a public charge.

B. DHS Adequately Considered Potential Harms

Plaintiffs also allege that the Rule is arbitrary and capricious because Defendants did not "adequately quantify or consider the harms that will result." Compl. ¶ 286. But DHS rationally weighed the benefits and costs of the Rule. It explained that, by excluding from the country those aliens likely to rely on public benefits and by encouraging those within the country to become self-sufficient, the Rule is likely to save federal and state governments billions of dollars annually in benefit payments and associated costs. *See* NPRM at 51228. At the same time, DHS recognized

that the disenrollment of aliens from public-benefit programs could have certain adverse effects. It noted, for example, that a reduction in public-benefit enrollment and payments could negatively affect third parties who receive such payments as revenue, including, for example, health-care providers who participate in Medicaid and local businesses who accept SNAP benefits. NPRM at 51118; Rule at 41313. DHS also recognized that disenrollment in public-benefit programs by aliens subject to the Rule or those who incorrectly believe they are subject to the Rule could have adverse consequences on the health and welfare of those populations, while also potentially imposing some "costs [on] states and localities." Rule at 41313.

Although it recognized these potential costs, DHS explained that there were reasons to believe that the costs would not be as great as some feared. *Id*. at 41313. Among other things, in response to commentator concerns, DHS took steps to "mitigate . . . disenrollment impacts," including by exempting certain public benefits from the list of those covered by the Rule. *Id*. at 41313-14. DHS also noted that the majority of aliens subject to the Rule do not currently receive public benefits, either because they reside outside the United States or because, following the 1996 welfare-reform legislation, they are generally precluded from receiving such benefits. *Id*. at 41212-13.

DHS also explained that those classes of aliens who are eligible for the noncash benefits covered by the Rule, such as lawful permanent residents and refugees, are, except in rare circumstances, not subject to a public-charge inadmissibility determination and are thus not affected by the Rule. *Id*. at 41313. DHS also considered and made plans to address disenrollment by those not covered by the Rule. To the extent such individuals disenroll from public benefits out of confusion over the Rule's coverage, the agency reasoned that the effect might be short-lived, as such individuals might re-enroll after realizing their error. *Id*. at 41463. DHS included in the Rule

detailed tables listing categories of aliens and indicating whether or not the public charge ground of inadmissibility applied, as well as tables of nonimmigrants indicating whether the public benefit condition would apply. *See id*. at 41336-46; *see also id*. at 41292 (summarizing populations to whom the rule does not apply). And, to clear up any potential remaining confusion as quickly as possible—thus minimizing disenrollment among populations not subject to the Rule—DHS further stated that it planned to "issue clear guidance that identifies the groups of individuals who are not subject to this rule, including, but not limited to, U.S. citizens, [certain] lawful permanent residents, . . . and refugees." *Id*. at 41313.

Ultimately, DHS rationally concluded that the benefits obtained from promoting self-sufficiency outweighed the Rule's potential costs. *Id*. at 41314. As the agency explained, the precise costs of the Rule were uncertain, given the impossibility of estimating precisely the number of individuals who would disenroll from public-benefit programs as a result of the Rule, how long they would remain disenrolled, and to what extent such disenrollment would ultimately affect state and local communities and governments. *See, e.g.*, *id*. at 41313. At the same time, the Rule provided clear but similarly difficult-to-measure benefits, such as helping to ensure that aliens entering the country or adjusting status are self-reliant and reducing the incentive to immigrate that the availability of public benefits might otherwise provide to aliens abroad. DHS's ultimate decision about whether to move forward with the Rule thus "called for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty." *Dep't of Comm.*, 139 S. Ct. at 2571. Given Congress's clear focus on ensuring that aliens admitted to the country rely on private resources and not public benefits, DHS's decision to prioritize self-reliance among aliens is plainly reasonable. *See San Francisco*, 944 F.3d at 800-05 (finding DHS likely to prevail in defending against APA claim that the Rule is arbitrary and capricious because DHS inadequately

considered harms); *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) ("When . . . an agency is obliged to make policy judgments where no factual certainties exist . . . we require only that the agency so state and go on to identify the considerations it found persuasive.").

C. The Rule Retains The Totality Of The Circumstances Standard And Relies On Appropriate Factors

Plaintiffs further allege that the Rule "replaces the statutory 'totality of the circumstances' test with a test that is vague, arbitrary, and unsupported by the evidence." Compl. ¶ 284. But the Rule could not be more clear that it retains the "totality of the circumstances" approach under which Executive Branch officials make individualized determinations regarding whether "in the opinion of [the officer] at the time of application for admission or adjustment of status, [the alien] is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). In addition, unlike the 1999 Field Guidance, the Rule clearly and transparently sets out the relevant factors and considerations that DHS will take into account in the totality-of-the-circumstances analysis. By contending otherwise, Plaintiffs disregard the plain text of the Rule.

The Rule, by its terms, "contains a list of negative and positive factors that DHS will consider as part of [the public charge] determination, and directs officers to consider these factors in the totality of the alien's circumstances." Rule at 41295. "The presence of a single positive or negative factor, or heavily weighted negative or positive factor, *will never*, on its own, create a presumption that an applicant is inadmissible . . . or determine the outcome of the . . . inadmissibility determination. Rather, a public charge inadmissibility determination must be based on the totality of the circumstances presented." *Id*. (emphasis added); *see also id*. at 41309 ("DHS has established a systematic approach to implement Congress' totality of the circumstances standard."). In fact, DHS made changes between the NPRM and the final version of the Rule to emphasize that the "totality of the circumstances" approach is retained—for example, by

"amend[ing] the definition of 'likely at any time to become a public charge'" by clarifying that this means "more likely than not at any time in the future . . . as determined based on the totality of the alien's circumstances." *Id*. at 41297.

D. The Rule Considers Relevant Factors in Assessing an Alien's Likelihood of Becoming a Public Charge

Plaintiffs further allege that the Rule is arbitrary and capricious because it "runs counter to the evidence before the agency, relies on factors Congress did not intend the agency to consider, and disregards material facts and evidence." Compl. ¶ 281. But DHS explained, at length, its reasons for including in the Rule the various factors it identified as weighing on the question whether an alien is likely to become a public charge. NPRM at 51178-207. The factors implemented Congress's mandate that the agency consider, at a minimum, each alien's "age"; "health"; "family status"; "assets, resources, and financial status"; and "education and skills" in making a public charge determination. *See id*. at 51178; 8 U.S.C. § 1182(a)(4)(B). DHS described in detail how each of the various factors bore positively or negatively on the determination whether an alien is likely to depend on public benefits in the future, while retaining the "totality of the circumstances" approach that allows each adjudicating officer to make a decision appropriate to each alien's particular circumstances.

For example, in concluding that English proficiency was a relevant factor in the public-charge inadmissibility calculus, DHS cited Census Bureau data and other studies indicating that non-English speakers earned considerably less money and were more likely to be unemployed than English speakers, thus supporting the conclusion that non-English speakers were more likely to become public charges than their English-proficient counterparts. NPRM at 51195-96. DHS also cited evidence indicating that noncitizens who reside in households where English is spoken "[n]ot well" or "[n]ot at all" received public benefits at much higher rates than noncitizens residing in

households where English was spoken "[w]ell" or "[v]ery well," lending further support to the conclusion that English proficiency is a relevant consideration. *Id*. at 51196. The Rule's suggested reliance on an alien's credit score was likewise not irrational. Credit scores provide an indication of the relative strength or weakness of an individual's financial status, and thus provide insight into whether the alien will be able to support himself or herself financially in the future. *Id*. at 51189; Rule at 41425.

E. Plaintiffs' Additional Allegations Do Not Show Any Arbitrariness Or Capriciousness

Plaintiffs next allege that the Rule is "arbitrary and capricious because it relies on incorrect legal interpretations of" two administrative decisions. Compl. ¶ 287. But the Rule is entirely consistent with both of those decisions as both decisions emphasized the Executive Branch's broad discretion to make public charge determinations. In *Matter of Vindman*, the Regional Commissioner emphasized that the "elements constituting likelihood of an alien becoming a public charge are varied," and that the term is "not defined by statute," but rather "determined administratively." 16 I. & N. Dec. 131, 132 (Reg'l Comm'r 1977). Likewise, *Matter of Harutunian* explained that Congress's broad delegation of authority in this area was necessary because "the elements constituting likelihood of becoming a public charge are varied." 14 I. & N. Dec. 583, 588-90 (Reg'l Comm'r 1974). Moreover, as the Ninth Circuit explained, *Matter of Harutunian* "pegged the public-charge determination to whether the alien was likely to 'need public support,' irrespective of whether the alien was likely to be institutionalized for any length of time and billed for the cost by the state." *San Francisco*, 944 F.3d at 795.

Lastly, Plaintiffs allege that the Rule is arbitrary and capricious because it allegedly discriminates against individuals with disabilities and immigrants of color. Compl. ¶¶ 283, 285-86. As discussed above and below, neither contention is correct. *See* Section IV.A *supra*; Section

VII *infra*.

VI. The Court Should Dismiss Count Four

Count Four of Plaintiffs' Complaint alleges that the Rule was promulgated "without observance of procedure required by law." Compl. ¶¶ 290-95. As to Plaintiffs' allegation that the Rule does not "quantify" harms, *id*. ¶ 293, the law does not require an agency to "quantify" all potential effects of a rule in order to comply with the APA. *See Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013) (the "law does not require agencies to measure the immeasurable"); *Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1263 (9th Cir. 2017) (finding agency action was not arbitrary and capricious notwithstanding agency's "failure to quantify" effects). "As predicting costs and benefits without reliable data is a primarily predictive exercise, the [agency] need[s] only to acknowledge [the] factual uncertainties and identify the considerations it found persuasive in reaching its conclusions." *Sec. Indus. Fin. Markets Ass'n v. CFTC*, 67 F. Supp. 3d 373, 432 (D.D.C. 2014). As discussed above, DHS easily met this standard. *See* Section V.B *supra*.

Also, there is no merit to Plaintiffs' argument that they were deprived of an opportunity to comment on certain aspects of the 12/36 standard. Compl. ¶ 294. An "agency's final rule need only be a logical outgrowth of its notice." *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013). A final rule qualifies as the logical outgrowth of the proposed rule if interested parties should have anticipated that the change was possible. *Id*. Here, Plaintiffs complain that the Rule did not adopt the 15% federal poverty guidelines threshold for the use of public benefits that was proposed in the NPRM, and instead used a standard that considers the duration and intensity of benefit usage. Compl. ¶ 294. But the NPRM discussed the proposed standard at length, NPRM at 51158-69, leading to extensive comments on the standard, including the 15% threshold, Rule at 41357-58. In the Rule, DHS explained in great detail why it was adopting the 12/36 standard

instead. *Id*. at 41357-63, 41358. Plaintiffs clearly had a sufficient opportunity to comment on what they believed the appropriate standard should be, as the submitted comments demonstrate.

VII. The Court Should Dismiss Count Five

In Count Five, Plaintiffs allege that the Rule violates the equal protection component of the Fifth Amendment to the Constitution. Plaintiffs fail to state an equal protection claim because their complaint includes no well-pled allegation that DHS issued the Rule based on any improper discriminatory motive. Plaintiffs do not deny that the Rule is facially neutral, but claim that the Rule violates Equal Protection because its alleged purpose is to disproportionately affect a particular racial or ethnic subset of immigrants. *See* Compl. ¶¶ 298-99. In support, Plaintiffs rely primarily on a handful of stray comments by certain non-DHS, government officials concerning immigration in general, rather than the Rule in particular. *See, e.g.*, Compl. ¶¶ 175, 178. Plaintiffs' allegations are insufficient to establish a plausible equal protection claim.

"[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 265. "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). "It implies that the *decisionmaker* . . . selected . . . a particular course of action at least in part 'because of,' not merely "in spite of," its adverse effects upon an identifiable group." *Id.* (emphasis added). Additionally, contrary to Plaintiffs' assertion, strict scrutiny does not apply simply because a plaintiff alleges a disproportionate impact on a particular racial or ethnic group. Unless a plaintiff adequately "allege[s] actual discriminatory intent, the deferential 'rational basis' standard is used to review the challenged" policy. *United States v. Moore*, 54 F.3d

92, 96 (2d Cir. 1995); *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Disproportionate impact . . . [s]tanding alone . . . . does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny").

A narrow standard of review here is particularly appropriate because this case implicates the Executive Branch's authority over the admission and exclusion of foreign nationals, "a matter within the core of executive responsibility." *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018); *id*. at 2419 (highly deferential standard is appropriate "[g]iven the authority of the political branches over admission"). Indeed, this "deferential standard of review" applies "across different contexts and constitutional claims" because "'it is not the judicial role in cases of this sort to probe and test the justifications of immigration policies." *Id*. "A conventional application of" this standard, "asking only whether the policy is facially legitimate and bona fide," would plainly require dismissal of Plaintiffs' equal protection claims because Plaintiffs do not contend there is anything facially discriminatory about the Rule. *Id*. at 2420. But dismissal is also appropriate if the Court were to apply rational basis review to Plaintiffs' claim.

Here, Plaintiffs' allegations do not suggest that DHS issued the Rule "because of" any alleged "adverse effects upon an identifiable" racial or ethnic group. First, "the [stated] purposes of the" Rule "provide the surest explanation for its" design and implementation. *Feeney*, 442 U.S. at 275, 279. The Rule's preamble (spanning roughly 200 pages) thoroughly explains the Rule's non-discriminatory justifications, including the need to facilitate self-sufficiency among immigrants. *See* Rule at 41295 ("DHS is revising its interpretation of 'public charge' . . . to better ensure that aliens subject to the public charge inadmissibility ground are self-sufficient"); *id*. at 41308 ("DHS believes [the] broader definition [of public charge] is consistent with Congress' intention that aliens should be self-sufficient. Self-sufficiency is, and has long been, a basic

principle of immigration law in this country. DHS believes that this rule aligns DHS regulations with that principle."). Additionally, the Rule's construction was guided by an extensive notice-and-comment process, following a NPRM that was just under 200 pages long. *See* NPRM, 83 Fed. Reg. 51114 (Oct. 10, 2018). The Rule included a number of changes from the proposed rule in response to public comments. *See, e.g.*, Rule at 41297. The Rule's procedural history undermines Plaintiffs' conclusory assertion that the Rule's design may somehow be attributed to any alleged improper bias.

Second, to show that DHS issued the Rule due to improper motives, Plaintiffs rely almost exclusively on alleged public statements by non-DHS officials that have no express connection to the Rule. The vast majority of the alleged public statements in the Complaint reflect general views on immigration. *See* Compl. ¶¶ 175-76, 178. And the few statements that *arguably* relate to the Rule are consistent with DHS's stated, non-discriminatory justifications for the Rule, including the need to incentivize self-sufficiency. *See* Compl. ¶ 178(b) ("new immigration rules" must ensure that "those seeking admission into our country must be able to support themselves financially"); Compl. ¶ 178(e) (aliens may come "*from all the countries of the world*" regardless of "whether they can pay their own way" (emphasis added)). Regardless, "contemporary statements" may be relevant to the question of whether an "invidious discriminatory purpose was a motivating factor," if made "*by members of the decisionmaking body*." *Arlington Heights*, 429 U.S. at 266, 268 (emphasis added); *see also Clearwater v. Indep. Sch. Dist. No. 166*, 231 F.3d 1122, 1126 (8th Cir. 2000) ("Evidence demonstrating discriminatory animus in the decisional process needs to be distinguished from stray remarks . . . statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process."). Here, Plaintiffs rely almost exclusively on statements made by non-DHS personnel, and Plaintiffs provides no explanation for how these

statements reveal that *DHS* harbored an improper motive in implementing the Rule. Although Plaintiffs refer to statements from certain personnel affiliated with components of DHS, these statements provide no indication of why these individuals supported the Rule. *See* Compl. ¶ 176.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion to Dismiss.

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Respectfully submitted,

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