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

MAKE THE ROAD NEW YORK, *et al.*, *Plaintiffs,* v. KEN CUCCINELLI, *et al.*, *Defendants*.	No. 19-cv-07993 (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. Dec. & Order, ECF No. 147 ("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 20, and that there are at least "serious questions going to the merits of [Plaintiffs'] Equal Protection Claim," *id.* at 21. 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).

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

[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.

threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; 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).

Plaintiffs rely on an "organizational" standing theory. *See, e.g.*, Compl. ¶¶ 25, 30, ECF No. 1 (alleging that Plaintiffs will divert resources as a result of the rule). Generally, for an organization to have standing, the challenged conduct must "perceptibly impair[]" the "organization's activities," with a "consequent drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). It is insufficient to allege only "a setback to the organization's abstract social interests." *Id.* In addition, an organization must show that "defendant's conduct or policy interferes with or burdens [its] ability to carry out its usual activities." *Citizens for Responsibility & Ethics in Washington ("CREW") v. Trump*, 276 F. Supp. 3d 174, 190 (S.D.N.Y. 2017), *vacated and remanded on other grounds*, No. 18-474, 939 F.3d 131 (2d Cir. 2019). An organization must show that it was compelled to direct resources towards activities it would not have performed "in the ordinary course." *Id.* at 191-92; *see also Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015) ("an organization does not suffer an injury in fact where it expend[s] resources to educate its members and others unless doing so subjects the organization to operational costs beyond those normally expended") (internal quotations omitted).

Here, Plaintiffs do not allege they were forced to direct resources towards activities that they do not perform in the ordinary course. Instead, Plaintiffs allege that they will have to direct resources into education and legal services for their clients, *see, e.g.*, Compl. ¶¶ 25, 30, 33, 38, precisely the services they regularly provide. *See, e.g.*, Declaration of Theo Oshiro ¶ 6, ECF No. 43 (Make the Road New York is in the business of providing "legal and survival services," and "transformative education"); Declaration of C. Mario Russell ¶¶ 4, 6-7, ECF No. 44 (Catholic

Charities Community Services regularly provides education and advocacy services to immigrant populations). Plaintiffs are "not wasting resources by educating the public" and providing legal services. *CREW*, 276 F. Supp. 3d at 191. "This is exactly how" organizations like Plaintiffs "spend[] [their] resources in the ordinary course," and thus they have suffered no "concrete or particularized injury."[2] *Id.* at 191-92.

Separately, Plaintiffs have asserted no coherent theory of standing for their Fifth Amendment claim, which they appear to assert on behalf of their members or constituents rather than themselves. *See* Compl. at 115. Because Plaintiffs have not even alleged the necessary elements of associational standing, much less provided evidence in support, they cannot pursue their Fifth Amendment claim. *See New York State Psychiatric Ass'n v. UnitedHealth Grp.*, 798 F.3d 125, 130 (2d Cir. 2015) ("An association has standing to bring suit on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.") (quotations omitted); *Summers*, 555 U.S. at 499; *NRDC v. FDA*, 710 F.3d 71, 79 (2d Cir. 2013).

"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

[2] In finding that the Plaintiffs established organizational standing, the Court concluded that the organizations were forced to expend resources to modify their pre-existing education and legal assistance services in light of the Rule. PI Order at 9. But providing these services, and updating them in light of new legal developments, is precisely what Plaintiffs do in the ordinary course.

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

Even if Plaintiffs could meet their standing burden, Plaintiffs' claims would still 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 organizations providing health care, advocacy, or community services, 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 a charge of removability, including the definition of public charge as applied to them). The interest in avoiding a purported "diver[sion]" of "resources" to educating their clients and providing them with guidance, *see, e.g.*, Compl. ¶ 25, is not even "marginally related" to the interests 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, 904 (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).

Likewise, Plaintiffs' equal protection claim seeks to assert the interests of third party individuals allegedly suffering from discrimination, and it would be those individuals, not non-profit organizations providing community services, that fall within the zone of interests of the Constitution's equal protection clause. *See generally Lexmark*, 572 U.S. at 127-28. 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. 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.

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 12. 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

A. The Rule Is Not Contrary to Statute

Count One alleges in part that the Rule violates the APA by exceeding DHS's statutory authority. Compl. ¶¶ 132-33, 274. Plaintiffs advance four theories why the Rule is contrary to the INA. First, they allege that the Rule expands the definition of "public charge" in a manner contrary to the statutory meaning of that term," *id.* ¶ 274(a). Second, they allege that the Rule establishes a framework that will deny adjustment of status to large numbers of immigrants who would be approved "under an approach consistent with the Act", *id.* ¶ 274(b). Third, they allege that the Rule's weighted-factors test is contrary to the statute, *id.* ¶ 274(c). None of these theories is correct;

the Rule's interpretation of public charge, including its consideration of non-cash benefits, accords with the statute and is buttressed by Congress' longstanding delegation to the Executive to resolve any ambiguities therein. Finally, Plaintiffs allege that the Rule "undermines the Congressional goal of promoting family unity," *id.* ¶ 274(e). This, too, is incorrect. 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 13. Under *Chevron*, courts first ask whether the statute is clear. *Chevron, U.S.A., Inc. 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 14. 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 14, that definition nonetheless fits comfortably within the statutory term "public charge" as it stands today and has been interpreted over time.

1. 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.

a. 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," Mem. Op. 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, 169-70 (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 fail to 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.

While the Court previously focused on *failed* legislation, it never addressed the legislation that passed. PI Order at 13-15. 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)).

b. 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).

c. 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 "require a substantial level of lengthy or permanent dependence on the public for subsistence." Compl. ¶ 64. *Gegiow* neither defined "public charge" nor foreclosed Defendants' interpretation of that term. At most, the case suggests that public charge inadmissibility determinations must 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.*[3] 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.

[3] In so holding, the Supreme Court ignored another maxim of statutory interpretation: that each term in a group, while perhaps "to be read as generically similar to the others," must nonetheless be given an independent meaning. *Commodity Trend Serv., Inc. v. CFTC*, 233 F.3d 981, 989 (7th Cir. 2000) (noting "the interpretive canon that all words in a statute should, if possible, be given effect") (citing *Dunn v. CFTC*, 519 U.S. 465, 472 (1997)). Congress thereby made "clear that the term 'persons likely to become a public charge' is *not* limited to paupers or those liable to become such; 'paupers' are mentioned as in a separate class." *Lam Fung Yen v. Frick*, 233 F. 393, 396 (6th Cir. 1916) (emphasis added). Indeed, they *cannot* mean the same thing.

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 13. 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.

2. The Framework Adopted by the Rule, Including the Weighted-Factors Test, Is Consistent With the Statute

While ostensibly separate grounds for finding that the Rule is contrary to law, the allegations that the Rule's framework is contrary to the INA merely reformulate Plaintiffs' central claim about the meaning of "public charge." Plaintiffs' contention concerning the "framework" adopted by the Rule, for example, is that it is not "consistent with the Act." Compl. ¶ 274(b). In other words, Plaintiffs insist that the Rule's framework should only capture noncitizens who fit Plaintiffs' definition of "public charge," *i.e.*, those who are "primarily dependent on the government for subsistence." *Id*. ¶ 132. But that is just another way of saying that the Rule defines "public charge" more broadly than the statute allows. For the same reasons set forth above, this claim should also fail.

Similarly, Plaintiffs' allegation with regard to the weighted-factors test is, at bottom, that it sweeps in persons not "primarily dependent on the government for subsistence." *Id*. ¶ 132. But again, that is *Plaintiffs'* definition of "public charge," not the statutory definition. Because this theory, too, is premised entirely on Plaintiffs' preferred definition of "public charge," which has been rebutted above, it should be dismissed for the same reasons.

3. The Rule's Consideration of Non-Cash Benefits Is Consistent with the Statute.

Plaintiffs allege at several points that the Rule impermissibly considers non-cash benefit programs. Compl. ¶ 76, 79, 84-89. This theory, too, fails to state a plausible claim.

The Ninth Circuit had no difficulty disposing of this 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 term "public charge" suggests a distinction between non-cash benefits and services and "cash assistance," as Plaintiffs allege. *Compare, e.g.*, Compl. ¶ 8 ("Congress rejected multiple efforts to define 'public charge' to include the receipt of noncash supplemental benefits."); *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.a *supra*.

4. 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" and the framework for determining who is likely at any point to become a public charge—including the application of a weighted-factors test and consideration 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 correctly concluded that 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 plain 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 792 (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 reject[ed] efforts to expand the meaning of 'public charge.'" Compl. ¶¶ 80-85. 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.

5. Plaintiffs' Concerns About Vagueness Fail to Show Any APA Violation

The Complaint alleges that the Rule violates the APA because it is "confusing, vague, and broad" thereby "inviting arbitrary, subjective, and inconsistent enforcement." Compl. ¶ 274(d). Plaintiffs' objection is illogical, however, because under past administrative practice (including the 1999 Field Guidance) DHS officers were required to apply an identical "totality of the circumstances" analysis but in a far more standardless context. 1999 NPRM at 28690.

As the Rule makes clear, the statute itself requires that DHS make public charge determinations by considering, "at a minimum," eight elements: age, health, family status, assets,

resources, financial status, education, and skills. 8 U.S.C. § 1182(a)(4). The statute provides no further guidance about these elements. Since 1996, DHS has been employing the totality of the circumstances test with respect to the eight elements, as required by IIRIRA, and the 1999 Interim Field Guidance confirmed that this approach is correct. By providing *additional* information to DHS officers to guide their consideration, including by enumerating specific benefits to consider and providing relative weightings of how DHS officers should account for various elements, DHS has *clarified* the application of this test, contrary to Plaintiffs' claim.

6. The Rule Is Consistent With Immigration Policy

Plaintiffs also allege that the Rule is arbitrary and capricious because it "undermines the Congressional goal of promoting family unity." Compl. ¶ 274(e). It is unclear what policies Plaintiffs are referring to, but nothing in the Rule rejects such a policy. On the contrary, the Rule is entirely consistent with U.S. immigration policy, including Congress's direction that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," that "the immigration policy of the United States [is] that aliens within the Nation's borders not depend on public resources to meet their needs," and that aliens must "rely on their own capabilities and the resources of their families, their sponsors, and private organizations." 8 U.S.C. § 1601.

7. Plaintiffs Do Not State A Claim that the Rule is Impermissibly Retroactive

A regulation has retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 280 (1994). Because the Rule has only prospective effect, Plaintiffs cannot state a claim that it is impermissibly retroactive.

Courts must exercise "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *Herrera-Molina v. Holder*, 597 F.3d 128, 134 (2d Cir. 2010). "[D]eciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Landgraf*, 511 U.S. at 268. Here, the Rule was carefully crafted to avoid any material retroactive effect. In particular, when administering the Rule, DHS personnel may only consider benefits received prior to the Rule's effective date if those benefits would have been considered under the prior public charge standard. *See* Rule at 41321 ("[A]ny benefits received before that date will only be considered to the extent they would have been covered by the 1999 Interim Field Guidance"). For example, TANF benefits were considered under the prior standard, and receipt of these benefits prior to the effective date of the Rule will be considered under the new standard because aliens had notice that they were part of the public charge determination. *See* Rule at 41459. By contrast, SNAP benefits were not covered by the prior standard, and under the Final Rule immigration personnel may only consider SNAP benefits received after the Rule's effective date. *See id.*

Plaintiffs argue that the Rule is retroactive because it considers an applicant's credit score for the first time, thus penalizing prior financial decisions. Compl. ¶ 141. But "a statute is not made retroactive merely because it draws upon antecedent facts for its operation." *Landgraf*, 511 U.S. at 270 n.24. After the Rule takes effect, immigration personnel will consider an alien's operative credit scores at the time of the public charge inquiry as only one relevant consideration among many. The Rule is not unlawfully "retroactive" simply because an alien's current credit score will reflect prior financial decisions. *See McAndrews v. Fleet Bank of Massachusetts, N.A.*, 989 F.2d 13, 16 (1st Cir. 1993) ("Even when the later-occurring circumstance depends upon the existence of a prior fact, that interdependence, without more, will not transform an otherwise prospective

application into a retroactive one" and so a regulation "may modify the legal effect of a present status . . . without running up against the retroactivity hurdle").[4]

Plaintiffs then argue that the Rule unsettles prior expectations since affidavits of support are now only one non-dispositive factor to be considered. Compl. ¶¶ 134-35. But this is not a departure from the 1999 Field Guidance, under which an alien may be found to be inadmissible on public charge grounds notwithstanding the filing of a sufficient affidavit of support. *See* Field Guidance at 28690 (stating that an affidavit of support is one factor "taken into account under the totality of the circumstances test"). In any event, a "statute does not operate 'retrospectively' merely because" it "upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269. Plaintiffs cannot state a claim based on the fact that the Rule prospectively alters what factors will be considered in a public charge determination or indeed how previously considered factors may be considered differently under the new Rule. In sum, the Rule does not impose any new legal consequence for any past conduct and therefore Plaintiffs cannot state a claim under any set of facts that it is impermissibly retroactive.

8. Plaintiffs Do Not State A Claim that the Rule Violates the Rehabilitation Act

Plaintiffs contend that the Rule "discriminates against individuals with disabilities in violation of the Rehabilitation Act." 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 charge

[4] Plaintiffs relatedly argue that the Rule penalizes prior receipt of cash assistance. Compl. ¶¶ 136-140. Plaintiffs argue that any amount of cash assistance may be considered as a factor under the Rule, whereas under the prior standard aliens would be considered public charges only if they were likely to be "primarily dependent" on cash benefits. Plaintiffs, however, conflate the public charge definition with the evidence immigration personnel consider when determining if that definition is met in a particular case. Even under the prior public charge standard, immigration personnel could generally consider prior receipt of cash assistance as evidence. *See* Rule at 41459. Thus, aliens have had "fair notice" that receipt of these benefits may lend support to a public charge determination. *Samuels v. Chertoff*, 550 F.3d 252, 260 (2d Cir. 2008).

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 20. 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.[5]

IV. The Court Should Dismiss Count Two

Count Two of Plaintiffs' Complaint alleges that the Rule is procedurally arbitrary and capricious in violation of the APA for various reasons. *See* Compl. ¶¶ 277-84. Count Two should be dismissed because none of the theories alleged in the Complaint plausibly suggest any procedural violation of the APA.

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

[5] Plaintiffs also allege that the Rule violates the APA because it "is motivated by animus against nonwhite immigrants." Compl. ¶ 274(h). This claim fails for the same reason as Plaintiffs' Equal Protection claims, *see* III.D *infra.*

Plaintiffs allege that the Rule is arbitrary and capricious because DHS failed to provide a "reasonable basis for departing from prior agency actions." Compl. ¶ 282(a). 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 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 16. 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. The Rule is Supported by Data and Evidence

Plaintiffs also allege that Defendants failed to "support their actions with appropriate data and evidence." Compl. ¶ 282(b). It is unclear precisely what supposed evidentiary deficiencies Plaintiffs believe exist, but the Complaint states that factors considered as part of the Rule's totality-of-the-circumstances, "like English language proficiency and credit scores, are supported by insufficient evidence and have no value for predicting who is likely to be a public charge." *Id*. ¶ 178. But 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.

C. DHS Adequately Responded to Public Comments

Plaintiffs also allege that the Rule is arbitrary and capricious because Defendants did not "provide a reasoned response to significant public comments." Compl. ¶ 282(c)(4). An agency's obligation to respond to comments on a proposed rulemaking, however, is "not 'particularly demanding.'" *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441–42 (D.C. Cir. 2012). "[T]he agency's response to public comments need only 'enable [courts] to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'" *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993). DHS plainly met this standard here.

The Complaint identifies a series of topics raised in comments that Plaintiffs claim DHS failed to address. Compl. ¶ 186. But that is incorrect. As to comments that the Rule is supposedly vague and invites discriminatory application, DHS explained that the NPRM had "provided specific examples of various concepts and laid out in great detail the applicability of the rule to different classes of aliens," and "also provided an exhaustive list of the additional non-cash public benefits that would be considered[.]" Rule at 41321. DHS also discussed the various changes it made to address the vagueness concerns, including revising the list of public benefits, simplifying the benefits threshold, and deciding not to consider receipt of benefits not listed in the Rule. *Id*. Further, DHS intends to provide "clear guidance to ensure that there is adequate knowledge and understanding among the regulated public regarding which benefits will be considered and when, as well as to ensure that aliens understand whether they are or are not subject to the public charge ground of inadmissibility." *Id*. Also, DHS extensively addressed comments that the Rule violates equal protection by describing the legitimate purposes of the Rule and explaining how it complies with applicable legal precedents. *Id*.

Likewise, DHS responded to comments claiming that the Rule retroactively considers

benefits that were not considered under the 1999 Field Guidance. DHS explained that it "will not apply the new expanded definition of public benefit to benefits received before the effective date of this final rule." *Id*. at 41321. "Therefore, any benefits received before that date will only be considered to the extent they would have been covered by the 1999 Interim Field Guidance." *Id*.

DHS also responded extensively to comments regarding the Rule's consideration of English language proficiency, *id*. at 41432-35, including comments about the standard for assessing such proficiency. "In general, certifications in a language or other evidence demonstrating an alien's education in the English and any other languages, for example, may demonstrate that the alien has attained some proficiency in the English language or another language." *Id*. at 41434. DHS also explained that it "would review the documentation of English proficiency such as certifications or an alien's transcript for a course of study that was primarily in English (such as a native speaker's secondary school transcript)" and "USCIS may confirm an alien's speaking and understanding of the English language through the question and answer process of the I-485 form during the adjustment of status interview." *Id*. DHS also recognized that applicants' English language skills may improve over time. *Id*. at 41433. Nevertheless, "DHS has established, through data presented in the NPRM, that an individual's inability to speak and understand English may adversely affect an alien's employability, and may increase receipt of public benefits." *Id*.

DHS also sufficiently responded to comments that an applicant who is able to work despite a chronic health condition should not be rendered a public charge. As DHS explained, the Rule's consideration of an applicant's health condition is "dependent on the alien's precise circumstances" and that "an alien may have a health condition that does not impact the alien's ability to work or secure employment or constitute a drain on the alien's financial resources, and

therefore such health condition would not make the alien likely to become a public charge." *Id*. at 41409. DHS also directly addressed comments that "a $10,000 bond was excessive" and explained why DHS instead chose a bond amount of $8,100. *Id*. at 41453-54.

Lastly, DHS extensively addressed comments that the Rule would cause harm to aliens. 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. Rule 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. v. New York*, 139 S. Ct. 2551, 2571 (2019). 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.").

Finally, there is no merit to Plaintiffs' allegation that they were deprived of an opportunity to comment on the provision making private health insurance a heavily weighted positive factor but excluding plans subsidized via tax credits. Compl. ¶ 188. 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, the NPRM expressly stated that it "would consider whether the alien has private health insurance" and explained that "[h]aving private health insurance would be a positive factor in the totality of the circumstances." NPRM at 51182, 51189. Thus, there should be no surprise that DHS decided to treat private health insurance as a heavily weighted positive factor, nor any surprise that DHS decided not to treat insurance purchased using tax subsidies as such a factor. Rule at 41448-49.

V. The Court Should Dismiss Count Three

Plaintiffs also cannot state a claim on the basis of their allegation that the Secretary of Homeland Security lacks rulemaking authority because the INA references the Attorney General. In the Homeland Security Act of 2002, Congress established the Secretary of Homeland Security as the head of DHS, and provided the Secretary with "direction, authority and control" over the Department as well as "vested" in him "[a]ll functions of all officers, employees, and organizational units of the Department." Pub. L. No. 107-296, § 102(a)(3), 116 Stat. 2135 (Nov. 25, 2002) (6 U.S.C. § 112(a)(3)). Congress further conferred general authority to issue regulations, 6 U.S.C. § 112(e), and specific authority to promulgate regulations implementing the immigration laws, 8 U.S.C. § 1103(a)(3) (providing that the Secretary "shall establish such regulations . . . as he deems necessary for carrying out" the immigration laws).[6] *See also* 6 U.S.C. § 202(3) (Secretary is responsible for "[c]arrying out the immigration enforcement functions vested by statute in, or performed by" the INS or its Commissioner); *id.* § 202(4) (Secretary is responsible for "[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States").

Having transferred the *functions* of INS, as overseen by the Attorney General, to DHS, under the control of the Secretary of Homeland Security, Congress then provided for all assignments of specific authority to a designated official to be transferred as well:

> With respect to any function transferred by or under this chapter (including under a reorganization plan that becomes effective under section 542 of this title)13 and exercised on or after the effective date of this chapter, reference in any other Federal law to any department, commission, or agency or any officer

[6] Because all relevant functions have been transferred away from the Attorney General, 8 U.S.C. § 1103(a)(1), does not leave rulemaking authority in the Attorney General's hands. Rather, the Attorney General has independent authority to promulgate regulations implementing authorities and functions exercised by the Executive Office for Immigration Review ("EOIR"). 8 U.S.C. § 1103(g)(2).

> or office the functions of which are so transferred shall be deemed to refer to the Secretary, other official, or component of the Department to which such function is so transferred.

Pub. L. No. 107-296 § 1517 (codified at 6 U.S.C. § 557). Thus, any reference to the Attorney General in a provision of the INA describing functions transferred from DOJ to DHS must be read as conferring upon the Secretary—either exclusively or concurrently with the Attorney General—the authorities described therein. *See, e.g.*, *Scheerer v. U.S. Att'y Gen.*, 513 F.3d 1244, 1251 & n.6 (11th Cir. 2008) (holding that, in light of 6 U.S.C. §§ 271(b) and 557, Congress conferred upon *both* the Secretary and the Attorney General adjustment of status authority under INA § 245(a), 8 U.S.C. § 1255(a), even though that section referred only to the "Attorney General").

Congress specifically "transferred from the Commissioner of Immigration and Naturalization to the Director of [USCIS]"—a component of DHS—all functions relating to immigrant visa petitions, naturalization petitions, asylum and refugee applications, adjudications performed at service centers, and all other adjudications performed by the INS. 6 U.S.C. § 451(b) (6 U.S.C. § 271(b)); *see La. Forestry Ass'n v. Dep't of Labor*, 745 F.3d 653, 659 (3d Cir. 2014) (explaining that "the authority to determine nonimmigrant visa petitions" no longer resides with the Attorney General); 6 U.S.C. §§ 251, 271 (transferring border-security and port-of-entry functions to Secretary of Homeland Security). As the Eleventh Circuit has explained, this transfer of authority includes, among other things, authority to grant adjustment of status to aliens who are not in removal proceedings. *Scheerer*, 513 F.3d at 1251 n.6. Thus, there is no set of facts which plaintiffs could allege that would allow them to prevail on their claim that the Rule was promulgated without rulemaking authority, and that claim must be dismissed.

VI. The Court Should Dismiss Count Four

In Count Four, 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. ¶¶ 201-02. 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.*, *id*. ¶¶ 204, 216. 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, e.g.*, Compl. ¶¶ 204, 216. 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 id.* ¶ 213 (generally stating that nobody should be "coming in that's on welfare"—without identifying any racial or ethnic subgroup); *id.* ¶ 216 (the "current immigration system cost[s] taxpayers enormously because" a substantial number of immigrants "receive some type of welfare benefit"). 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. ¶¶ 223-32.

CONCLUSION

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

Dated: February 14, 2020

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