**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| MAKE THE ROAD NEW YORK, *et al.*,<br><br>*Plaintiffs,*<br><br>v.<br><br>KENNETH CUCCINELLI, *et al.*,<br>*Defendants*. | No. 19-07993 (GBD) |
| STATE OF NEW YORK, *et al.*<br><br>*Plaintiffs*,<br><br>v.<br><br>U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*<br><br>*Defendants*. | No. 19-cv-07777 (GBD) |

**REPLY TO PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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## INTRODUCTION

Plaintiffs' response brief relies heavily on the Court's prior ruling preliminarily enjoining the Department of Homeland Security's ("DHS") final rule *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292 (Aug. 14, 2019) ("Rule"). However, not only did the Court's preliminary injunction order not rule on every ground asserted by Plaintiffs in their complaints, but also in the intervening months, the Supreme Court and Ninth Circuit have issued orders supporting Defendants' motion to dismiss with respect to the claims the Court tentatively resolved in Plaintiffs' favor.[1]

On January 27, 2020, the Supreme Court stayed the Court's injunctions, necessarily concluding that Plaintiffs were unlikely to prevail on their claim that the Rule is inconsistent with the Immigration and Nationality Act ("INA") public charge ground of inadmissibility. Further, the Ninth Circuit issued a thorough opinion staying injunctions against the Rule issued by two other district courts. The Ninth Circuit correctly noted that, contrary to Plaintiffs' assertion here, the statutory term "public charge" has never been given a precise definition, much less Plaintiffs' preferred definition. Instead, the government has historically been given broad discretion in construing the term "public charge" in light of changing circumstances.[2]

Following an extensive notice-and-comment process, DHS exercised its discretion and issued the Rule to synchronize the government's enforcement of the public charge ground of inadmissibility with a central policy underlying the immigration laws: to incentivize "[s]elf sufficiency," 8 U.S.C. § 1601(1), and ensure that "aliens within the Nation's borders not depend

[1] Particularly in light of these rulings, the Court should not simply defer to its preliminary injunction decisions, as Plaintiffs suggest. However, it is also well-established that "[a] district court's decision to grant…preliminary injunction does not constitute law of the case and will not estop the parties nor the court as to the merits." *Alharbi v. Miller*, 368 F. Supp. 3d 527 (E.D.N.Y. 2019).

[2] The Ninth Circuit also rejected the same arguments made by the Plaintiffs here regarding the Rehabilitation Act.

on public resources to meet their needs," *id*. § 1601(2)(A). Accordingly, for the reasons set forth herein, the Court should grant Defendants' motion to dismiss.

## I. Plaintiffs' Claims Are Not Justiciable.

Neither the State Plaintiffs nor the Organization Plaintiffs have standing to challenge the Rule. First, none of the alleged injuries to the State Plaintiffs are "certainly impending." *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990). The State Plaintiffs' principal injury theory relies on an elongated causal chain: (i) a material number of aliens must dis-enroll from all public health benefits, even though the Rule exempts receipt of Medicaid benefits for emergency services, (ii) a certain number of these aliens must then require emergency care, and must specifically turn to health providers operated by the State Plaintiffs in particular, rather than the alternatives, and (iii) any additional costs to the State Plaintiffs as a result of the Rule must eclipse what they will save as a result of the Rule (Plaintiffs themselves note that "noncitizens will forgo . . . more than $1 billion in state benefits, every year, because of the Rule," Mem. of Law in Opp'n to Defs.' Mots. To Dismiss 14, ECF No. 145 ("Opp'n")). The State Plaintiffs do not dispute that their primary alleged injury will materialize only if each link in the causal chain is present, and they cite to no binding precedent indicating that a party may have standing based on this type of speculative theory of injury.[3]

The Organization Plaintiffs also fail to establish standing to challenge the Rule because they do not allege that the Rule "perceptibly impair[ed]" any of their concrete "*activities*." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The Organization Plaintiffs do not allege that the Rule interferes with the provision of any of their pre-existing legal or social services. They

[3] The State Plaintiffs also, again, refer to "training and outreach efforts" or incidental "operational costs on benefit-program administrators." Opp'n at 19-20. If those kinds of administrative and training costs were enough to establish standing, any State or locality could challenge any policy that had any effect on its residents. Plaintiffs cite no authority embracing such a broad theory of standing.

allege only that the Rule is inconsistent with their "social interests," *id.*, and that they thus elected to spend resources in response to the Rule. But "[parties] cannot manufacture standing merely by inflicting harm on themselves" by "incur[ring] [costs] in response to a" policy. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

Even if Plaintiffs could establish Article III standing, Plaintiffs' arguments confirm that their purported injuries fall outside the public charge inadmissibility provision's zone of interests. Plaintiffs' alleged harms are entirely premised on the predicted effects of *decreased* benefit use by aliens, and on resulting burdens on the organizations. *See* Opp'n at 14-15, 21-22. They thus seek to *increase* spending on public benefits, "the very . . . interest" that "Congress sought to restrain" in the public charge inadmissibility provision. *Nat'l Fed'n of Fed. Emps. v. Cheney*, 883 F.2d 1038, 1051 (D.C. Cir. 1989).

State Plaintiffs respond by claiming that the public charge inadmissibility provision is generally intended to "protect state and city fiscs" or to "ensure that States and their subdivisions continue to receive the economic and other benefits that flow" from immigration. Opp'n at 24. But the provision plainly is not intended to do so by encouraging aliens to rely more on federal benefits. The Organization Plaintiffs, for their part, rely on extraneous INA provisions, including those that give advocacy organizations a role in helping aliens navigate immigration proceedings. *Id.* at 25.[4] But this says nothing of whether they come within the zone of interests of interest of the specific "*statutory provision* whose violation forms the legal basis for [its] complaint"—the public charge provision.[5] *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) (emphasis added).

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[4] The Northern District of California rejected the same arguments and found similar organizational plaintiffs outside the zone of interests of the public charge statute in *City & Cty. of San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1114-18 (N.D. Cal. 2019) (reversed in part on other grounds).

[5] The Organization Plaintiffs' alleged injuries likewise do not come within the zone of interests of the equal protection clause. The equal protection clause protects against a particular injury: impermissible differential treatment based on a party's membership in a particular group. *See McMichael v. Napa Cty.*, 709 F.2d 1268, 1272 (9th Cir. 1983) ("the equal protection clause works" to "prevent a largely unaffected group" from passing policies with the intention of

## II. The Rule is not Contrary to Law.

### A. The Rule is entitled to *Chevron* deference and passes muster under that framework.

Plaintiffs argue, as they did at the preliminary-injunction stage, that *Chevron* does not apply in this case. Opp'n at 27 (citing *King v. Burwell*, 135 S. Ct. 2480 (2015)). This Court properly rejected that argument in its prior opinion. Preliminary Injunction Opinion ("NY PI Op."), *New York v. DHS*, 19-cv-7777, ECF No. 110 at 11. Congress expressly delegated the question of admissibility to agency discretion in the INA: "Any alien who, *in the opinion of the consular officer* at the time of application for a visa, or *in the opinion of the Attorney General* at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A) (emphasis added). *See City & Cty. of San Francisco v. USCIS.*, 944 F.3d 773, 791 (9th Cir. 2019) (" [T]he 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."). Therefore, the "hesitat[ion]" expressed by the Supreme Court in *King* is unwarranted here. 135 S. Ct. at 2489.

Plaintiffs then attack a straw-man argument never advanced by Defendants: that DHS's discretion to interpret "public charge" is boundless. Opp'n at 28-29. DHS has never claimed "unfettered discretion," *id.* at 28, to interpret the term or to erect a framework for predicting whether an alien is likely to become a public charge. Instead, Defendants have argued—and the Ninth Circuit has affirmed—that Congress intended, both through the "opinion" language above and the regulatory authority conferred on the agency, "that DHS would resolve any ambiguities in

"primarily affecting another group"). The Organization Plaintiffs here, of course, have suffered no differential treatment under the Rule. *See id.* (plaintiff is not "'arguably within the zone of interests to be protected or regulated' by the equal protection clause" since he has not suffered "the underlying harm the constitutional guarantee was intended to prevent").

the INA." *San Francisco*, 944 F.3d at 792 (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016)). That is all the Court need find here.

*Chevron* step one requires the Court merely to determine whether "public charge" is unambiguous or, instead, admits of multiple interpretations. If anything is clear from the multitude of sources submitted for the Court's consideration, *compare* Mem. of Law in Supp. of Defs.' Mot. to Dismiss 13-22, ECF No. 177 ("MTR Mot.") *and* Mem. of Law in Supp. of Defs' Mot. to Dismiss 13-22, ECF No 141 ("NY Mot.") *with* Opp'n at 3-12, it is that "the phrase 'public charge' is ambiguous," *San Francisco*, 944 F.3d at 798. Although Plaintiffs cite the 1999 Guidance as having "reaffirmed the agency's longstanding approach to public charge," Opp'n at 11, the accompanying notice of proposed rulemaking specifically noted that the term was "ambiguous"; that it had "never been defined in statute or regulation"; and that the 1999 Guidance's definition was only one "reasonable" interpretation of the term. *Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28676, 28,677 (May 26, 1999) ("1999 Field Guidance").

*Chevron* step two requires the Court to determine whether the Rule's definition falls within the ambiguous meaning of "public charge" in the INA. As an initial matter, Plaintiffs miss the mark when they insist that the Rule's definition has "*never* been referenced in the history of the U.S. immigration law," or that "there is *zero* precedent supporting [the Rule's] particular definition." Opp'n at 29 (quoting NY PI Op. at 13). Agencies are allowed to adopt new positions—just as INS did in 1999. The question under *Chevron* is merely whether that position comports with the statute. For the following reasons, it does.

**1. The Rule's definition falls within the historic meaning of "public charge" in the INA.**

Plaintiffs purport to derive a "plain meaning" of the term from "the 1882 Immigration Act itself and its legislative history, as well as the state laws on which the statute was modeled." Opp'n

at 29-30.[6] As to the statute itself, Plaintiffs cite nothing other than the fact that it contains the term "public charge." *Id.* at 4. As to the "legislative history," Plaintiffs rely on a single statement by a single representative. *Id.* Neither of these conveys a plain meaning of "public charge."

As to the "state laws," Plaintiffs cite one case: *City of Boston v. Capen*, 61 Mass. 116 (1851). Under the Massachusetts statute at issue in that case, ship owners landing at the port of Boston were required to post a bond "if, on examination, by the boarding officer, of any vessel, there shall be found among the passengers any lunatic, idiot, maimed, aged or infirm persons, incompetent, in the opinion of the officer so examining, to maintain themselves, or who have been paupers in any other country." *Id.* at 121. The purpose of the bond was to ensure "no such lunatic or indigent passenger shall become a city, town or state charge, within ten years from the date of said bond." *Id.* The court naturally concluded that "paupers in a foreign land" would have been "public charge[s] in another country," for "pauper" was being used "in its legal, technical sense." *Id.* Accordingly, to be a pauper in that sense, "it is not sufficient that, in the opinion of the boarding officer, some of the passengers are poor and destitute, and so likely to become chargeable to the city, town or state." *Id.*

But all of that is an interpretation of "pauper," not "public charge." *Contra* Opp'n at 4 (drawing from *Boston v. Capen* a plain meaning of "public charge").[7] And while a pauper in that sense would undoubtedly qualify as a public charge under the INA, it does not follow that every public charge must rise to the level of being a pauper as that term was used in 1851.[8] In any event,

[6] That authority, such as it is, is set forth earlier in Plaintiffs' brief, Opp'n at 3-5.

[7] Even in the context of paupers, Plaintiffs misquote the opinion. The term "incompetent to maintain themselves" applied only to "lunatics, idiots, maimed, aged, or infirm." 61 Mass. at 121. It was a separate section of the Massachusetts statute that excluded "those who have been paupers in a foreign land." *Id.*

[8] In 1882, 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").

neither *Boston v. Capen* nor the state law it analyzed informs the meaning of "public charge" in the 1882 statute.

Plaintiffs also cite an "immigrant fund" tax imposed by the 1882 Immigration Act on ship owners bringing aliens to the United States, as evidence that the term "public charge" did not include those aliens who might receive some amount of "public support" after admission. Opp'n at 4. But the immigrant fund created by the 1882 tax was funded by those directly involved in, and benefiting from, the transport of aliens to the United States—*i.e.*, the ship owners, or, in some cases, the aliens themselves. *See* Immigration Act of 1917, Pub. L. No. 64-301, ch. 29 § 2, 39 Stat. 874. Unlike modern-day public benefits such as SNAP and Medicaid, it was not financed by the public at-large. The tax is thus analogous to the modern affidavit of support provision, 8 U.S.C. § 1183a. Regardless, even if Congress had provided *public* assistance, a decision to provide a safety net does not entail an intent to admit individual aliens whom the government predicts are likely to need it.

While failing to muster historical authority in support of their position, Plaintiffs also fail to rebut the authority cited by Defendants. In a footnote, they suggest that *In re Day*, 27 F.678 (C.C.S.D.N.Y. 1886) is unavailing. Opp'n at 4 n.2. In that case, certain children from England were denied admission as likely public charges under the 1882 Act and sought habeas relief. *Id.* at 679. The court found "competent evidence" for concluding that the children were inadmissible: in particular, the children's "evident youth" and "the absence of any person that had legal authority or control over them." *Id.* at 680-81. But because these children were 12-15 years old, *id.* at 679, their minority status and inability to support themselves were both temporary. There was no other evidence that they would be unable to earn a living; indeed, arrangements had been made to place them on farms. *Id.* Nevertheless, the court affirmed that they were inadmissible, demonstrating at

a minimum, that "public charge" has not historically meant "permanently and primarily dependent on the government for support." *New York v. DHS*, 19-cv-7777, Compl., ECF No. 17, ¶¶ 157-59.

Plaintiffs take issue with dictionaries and a treatise cited by Defendants, claiming that they all rely on another, ostensibly unavailing case: *Ex Parte Kichmiriantz*, 283 F. 697 (N.D. Cal. 1922). Opp'n at 7. But that case interpreted "public charge" as the words "mean ordinarily," as "*a* money charge upon, or *an* expense to, the public for support and care." *Id.* at 698 (emphasis added). Accordingly, because the petitioner in that case would presumably have had his medical care paid for by his family, as required by California law, he stood to pose no "public charge" within the meaning of the 1917 Act.

Plaintiffs then invoke a "century-long judicial and administrative interpretation" in support of their position. Opp'n at 30. That history begins with *Gegiow v. Uhl*, 239 U.S. 3 (1915), which Plaintiffs again describe incorrectly. Opp'n at 5. Defendants have thoroughly debunked Plaintiffs' reliance on that case, *e.g.*, NY Mot. at 19-21, but will reiterate three salient points here. First, everything that Plaintiffs would take from *Gegiow* is, at most, dicta. "The 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." *Gegiow*, 239 U.S. at 9-10. The fact that the aliens in *Gegiow* were "illiterate," or "had only $65 in their possession," was irrelevant to the case. *Contra* Opp'n at 5. Second, the sole textual basis on which the Court held that aliens must be judged in their individual circumstances was the proximity of "public

charge" to "paupers" and "professional beggar" in the statute.[9] Those terms all connoted "permanent *personal* objections." *Gegiow*, 239 U.S. at 10 (emphasis added).[10]

Third, Congress acted immediately to sever the connection between "public charge," "pauper," and "professional beggar," thus eviscerating the sole ground on which *Gegiow* stood. *See* Immigration Act of 1917, 64th Cong. ch. 29 § 3, 39 Stat. 874, 876 (moving "public charge" down the list of inadmissible classes of aliens, away from "pauper" and "public charge," with no other change). Although the history of that amendment shows that this was meant to overrule *Gegiow*,[11] the Court need not resolve the Parties' dispute over that history. There is no other, plausible explanation for moving the term "public charge" away from "pauper" and "professional beggar," other than to remove any gloss that "public charge" might have taken from those terms. Certainly, Plaintiffs have offered no such explanation. And while they cite three cases that failed to recognize the import of the 1917 amendment, Opp'n at 5 n.3, other cases did recognize the amendment. *See Ex Parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923); *United States ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929) (L. Hand, J.). Plaintiffs have failed to show that the Rule's definition is foreclosed by historical, judicial interpretations of the term "public charge."

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[9] The Court also reasoned, in dicta, that the structure of the 1907 Act foreclosed a determination based on one city's labor market. Section 1 of the Act allowed the President, upon finding that passports from another country were "being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein," to refuse entry to citizens of those countries. 1907 Act, § 1, 34 Stat. at 898. Because this determination had to be based on *national* labor markets, the Court reasoned that it would be "an amazing claim of power" if immigration commissioners were able to use the "guise of a [public charge] decision" to make the determination on a local level. But because the Court had already ruled, for the textual reasons above, that "public charge" connoted a *personal* objection, the question of national versus local labor markets was unnecessary to the Court's holding.

[10] Again, because the sole question was whether individual or environmental circumstances governed the public charge analysis, the key word is "personal," not "permanent." *Gegiow* never purported to address whether permanence was required to be a public charge.

[11] *See* Letter from Sec. of Labor to House Comm. on Immig. and Naturalization, H.R. Doc. No. 64-886, at 3 (Mar. 11, 1916); S. Rep. No. 64-352, at 5 (1916); 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).

That leaves Plaintiffs with historical administrative interpretations. Their "leading case," *Matter of B-*, 3 I. & N. Dec. 323 (B.I.A. 1948, A.G. 1948), does not carry the day. Opp'n at 5-6.[12] The question in *Matter of B-* was whether the alien, committed to a mental hospital less than six months after entry, had become a public charge. The Board held that she could not have become a public charge based on the cost of the hospital services, reasoning that Illinois law did not allow the state to charge the alien for treatment rendered. 3 I. & N. Dec. at 326-27. However, because Illinois law made the patient responsible for "clothing, transportation, and other incidental expenses," the alien *could* have been deemed a public charge if she (or her family) failed to reimburse those expenses. *Id.* at 327.[13] *Matter of B-* contemplates a scenario in which failure to repay even "incidental expenses" incurred by a state hospital could render one a public charge. Inexplicably, Plaintiffs find "nothing in the opinion" to suggest that "receipt of even a small amount of temporary or incidental benefits would be sufficient." Opp'n at 6. As the foregoing makes clear, however, that is exactly what the Board held.

Plaintiffs cite two other Board decisions, neither of which helps them. Defendants agree with *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409 (B.I.A. 1962; A.G. 1964), that the public charge determination "requires more than a showing of a possibility that the alien will require public support." *Id.* at 421. Rather, the alien must be "*likely* at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A) (emphasis added). Defendants also agree that the determination must be made based on "[s]ome specific circumstance," 10 I & N. at 421, which is why the Rule adopts a totality of circumstances test. Defendants also agree with *Matter of Perez*, 15 I. & N. Dec. 136,

[12] At the outset, it is worth remembering that *Matter of B-* was a deportation case. Thus, while INS agreed that the alien in that case should not have been deported, it does not follow per se that INS would have deemed the alien admissible. The government bears a higher burden of proof in deportation proceedings under 8 U.S.C. § 1227(a)(5) than it does in the admissibility determinations under 8 U.S.C. § 1182(a)(4). *See* 8 U.S.C. § 1229a(c).
[13] The alien's sister paid those incidental expenses, so the alien did not, ultimately, become a public charge.

137 (B.I.A. 1974) ("The determination of whether an alien is likely to become a public charge under section 212(a)(15) is a prediction based upon the totality of the alien's circumstances at the time he or she applies for an immigrant visa or admission to the United States. The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge."). The Rule imposes a totality of circumstances test, under which receipt of welfare does not render an alien per se inadmissible or ineligible for adjustment of status.

Plaintiffs' history of "administrative interpretation" culminates with the 1999 Field Guidance. Opp'n at 30-31. As noted above, the accompanying notice of proposed rulemaking specifically noted that the term "public charge" was "ambiguous"; that it had "never been defined in statute or regulation"; and that the 1999 Guidance's definition was only one "reasonable" interpretation of the term. 1999 Field Guidance at 28676-77. This is key for *Chevron* purposes: that fact that an agency interprets a statutory term differently in two consecutive regulations does not make either interpretation unlawful. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (finding "no basis in the Administrative Procedure Act . . . for a requirement . . . [of] more searching review" when an agency changes its position). Rather, the question is always whether the interpretation at issue is reasonable under the statute. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

Plaintiffs argue that Congress has repeatedly reenacted the "public charge" provision "without relevant change," which "evidences its approval of the agency interpretation." Opp'n at 11-12, 31. This argument fails for several reasons. First, in order to be deemed incorporated by congressional reenactment, an administrative interpretation must be "uniform and well understood." *Bernardo v. Johnson*, 814 F.3d 481, 490 n.12 (1st Cir. 2016) (citing *Merrill Lynch,*

*Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 380 (1982)).[14] For the reasons stated above, Plaintiffs' present interpretation "was neither well understood nor a widely accepted part of the contemporary legal landscape." *Id.* Second, Congress *has* made "relevant changes" to the public charge provision. In 1917, Congress moved "public charge" far away from "paupers" and "professional beggars in order to overcome the reasoning of *Gegiow*. In 1952, Congress added language committing public-charge inadmissibility determinations to the Executive Branch's "opinion." Pub. L. No. 82-414 § 212(15) (1952). And in 1996, Congress introduced the affidavit of support provision, discussed below. Third, Congress's repeated decision to leave the term undefined only confirms its decision to leave the term's definition in the discretion of the Executive Branch. *San Francisco*, 944 F.3d at 797. Finally, as to the 1999 Field Guidance, the "public charge" provision has not been reenacted since that non-binding interpretation was issued.

Plaintiffs make much of legislation that was introduced but failed to pass. Opp'n at 31-32. Failed legislative proposals are a dubious means of interpreting a statute, and that is particularly true here. Congress did not reject the 1996 and 2013 proposals in favor of alternative language. In both instances, it left the statutory term "public charge" undefined. "If anything, this legislative history proves only that Congress decided not to constrain the discretion of agencies in determining who is a public charge." *San Francisco*, 944 F.3d at 798 n.15. Nor is there any indication that Congress believed that either the 1996 or 2013 proposed definitions of "public charge" were inconsistent with an established meaning of the term. Rather, the history of the 1996 proposal indicates that the President objected to a rigid statutory definition of the term. *See* 142 Cong. Rec. S11872, S11881-82 (daily ed. Sept. 30, 1996). And, in 2013, Congress rejected the committee bill

[14] Similarly with regard to judicial interpretations, they must be "unanimous," especially when they are lower courts. *Leist v. Simplot*, 638 F.2d 283, 310-11 (2d Cir. 1980). As shown above, the history of judicial interpretations of "public charge" has been mixed, at best. In no event can Plaintiffs show a "unanimous" history of judicial interpretations in their favor, such that Congress could be deemed to have adopted their definition of "public charge" in the statute.

that had rejected the proposal. This case thus bears no resemblance to cases in which Congress has adopted alternative proposals or tacitly accepted longstanding interpretations.

**2. Related provisions in the INA and other statutes confirm that the Rule's definition is reasonable.**

Instead of focusing on legislation that failed, the Court should rely on what passed. In enacting welfare and immigration-reform legislation in 1996 (the last time the public charge inadmissibility provision was amended), Congress expressed its desire that "aliens within the Nation's borders not depend on public resources to meet their needs" and that "the availability of public benefits not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(2). The Rule accords with that express intent.

Plaintiffs cannot deny that these "statements of policy," Opp'n at 34, have a direct connection with the "public charge" provision. The policy statements accompanied legislation that altered the public charge determination by introducing the affidavit of support provision, 8 U.S.C. § 1183a. *See* Pub. L. No. 104-193, § 423, 110 Stat. 2105 (1996). And in the statements of policy themselves, Congress expressly identified the "compelling government interest" in enacting stricter "rules" for "sponsorship agreements [(*i.e.*, public-charge-related affidavits of support)] in order to assure that aliens be self-reliant." 8 U.S.C. § 1601(5).

Plaintiffs are wrong that Congress' policy was vindicated by certain limits on use of benefits by immigrants, such as the waiting period for qualified aliens. Opp'n at 34. It does not follow, from delayed availability of certain benefits, that Congress intended the *admission* of aliens who would require such benefits. Plaintiffs concede, for example, that an alien's expected receipt of cash benefits can render him inadmissible as likely to become a public charge, even though Congress similarly authorized aliens to receive such benefits. The dichotomy simply reflects that immigration officials cannot always predict who will become a public charge.

Nor can Plaintiffs deny that the affidavit of support provision, introduced in 1996, further supports the Rule's interpretation of "public charge." NY Mot. at 13-14. Put simply, Congress 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. *Id.* at 14. Plaintiffs misunderstand this as an argument that Congress "intended to redefine" or "transform the threshold meaning of 'public charge'" through the affidavit of support provision. Opp'n at 35, 36. Far from an "elephant in [a] mousehole[]," *id.* (quoting *Whitman v. Am Trucking* Ass'ns, 53 U.S. 457, 468 (2001)), that provision merely shows that Congress did not hold Plaintiffs' view of the term "public charge."

Plaintiffs resist the import of the affidavit of support provision because not all aliens subject to a public charge inadmissibility determination must obtain an affidavit of support, and because the affidavit is enforceable only for a specified period of time after admission. Opp'n at 35-36. But those observations miss the point. In classifying aliens who fail to submit a required affidavit of support as being inadmissible on the public-charge ground, Congress could not have shared Plaintiffs' narrow understanding of "public charge" as limited to aliens who are expected to be primarily dependent on the government.

Plaintiffs urge repeatedly that the affidavit of support is "separate" from the public-charge analysis. Opp'n at 36. But the public charge inadmissibility statute itself provides that, in addition to the enumerated factors, "the Attorney General may also consider any affidavit of support under section 1183a of this title." 8 U.S.C. § 1182(a)(4)(B)(ii). And a central purpose of the affidavit of support provisions is to aid immigration officials in making public charge determinations. *See* 8 U.S.C. § 1183a(a)(1) ("No affidavit of support may be accepted by the Attorney General or by any consular officer to establish that an alien is not excludable as a public charge under section

1182(a)(4) of this title unless such affidavit is executed by a sponsor of the alien as a contract"). If the absence of such an affidavit can render certain aliens *per se* public charges, then "public charge" cannot mean only those who are "permanently and primarily dependent on the government for support." NY Compl. ¶¶ 157-59.

Finally, Plaintiffs contest that an exception in the INA public charge analysis—which directs DHS *not* to "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)(1)(A)—supports Defendants' position. Opp'n at 37. Once again, Plaintiffs overstate the argument. The battered-alien exception did not "radically reinterpret 'public charge' *sub silentio*." *Id.* Rather, it simply underscores that the Rule is a reasonable reflection of Congress' understanding of "public charge"—namely, that noncash benefits ordinarily *would* be considered, if the alien did not meet the exception.

**3. Consideration of supplemental, non-cash benefits, even for a temporary period, does not violate the INA.**

Plaintiffs argue that consideration of "supplemental benefits" runs afoul of the INA. Opp'n at 32-33. Most of this argument depends on a "historically established meaning" that, for reasons stated above, is anything but. *Id.* at 32. Defendants offer two additional points here. First, Plaintiffs' position is hard to square with their own interpretation, under which "cash assistance"—even if supplemental—can be considered. Compl. ¶ 4. Thus, the "supplemental" nature of a benefit cannot be grounds for excluding it from the public-charge analysis, even on Plaintiffs' theory. Second, it is not contradictory to suggest that someone is "dependent on the public," Opp'n at 33, for even "supplemental" benefits. Thus, the fact that SNAP or other non-cash benefits are available to those above the poverty line, or those who are able to work, is beside the point. Opp'n at 32, 33.

The benefits are nonetheless calculated to supplement what an individual or family is able to provide for themselves, such that they have what they need.

Plaintiffs also argue that the "categorical treatment of supplemental benefits" betrays the meaning of "public charge." Opp'n at 33. But while the Rule's *definition* of a "public charge" is an alien who receives the enumerated benefits for 12 months of 36-month period, the framework for determining *whether* an alien is likely to become a public charge is anything but automatic. The past receipt of public benefits above the 12/36 threshold, for example, is but one factor under the Rule's totality of circumstances framework. Rule at 41298-99, 41504.

Finally, Plaintiffs fault the Rule for considering benefits used "temporarily." Opp'n at 33. But the statute itself queries whether an alien is "likely *at any time* to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A). And Plaintiffs' analogizing to "almshouses" and "institutional care," Opp'n at 33, again reflects their misunderstanding of the term's history, which is addressed at length above.

**B. Plaintiffs fail to state a claim that DHS lacks statutory authority to promulgate the Rule.**

Plaintiffs' assertion that the Secretary of Homeland Security lacks rulemaking authority because the INA references the "Attorney General" is meritless. *See* Opp'n at 38-39. As explained in detail in Defendants' motion, the Homeland Security Act of 2002 ("HSA") vested all functions and authority related to the relevant immigration laws, including rulemaking authority, in the Secretary of Homeland Security. MTR Mot. at 41-42.

Because all relevant functions have been transferred away from the Attorney General, 8 U.S.C. § 1103(a)(1), relied on by Plaintiffs, does not leave rulemaking authority applicable to DHS operations 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). Plaintiffs misunderstand *Sarango v. U.S. Att'y Gen.*, which addressed a unique situation in which Congress specifically amended the INA in 2006 with the clear "intent to divest the Attorney General of authority to consider consent [to reapply for admission] requests [under 8 U.S.C. § 1182(a)(9)(C)(ii)] and to endow the Secretary . . . with this authority." 651 F.3d 380, 385 (3d Cir. 2011).

Plaintiffs also contend that the Court must refuse to consider the effect of the HSA on the proper interpretation of the INA because the HSA is not referenced in the Notice of Proposed Rule Making ("NPRM"), 83 Fed. Reg. 51114, Oct. 10, 2018, or the Final Rule. Opp'n at 38. However, the APA requires only that the NPRM cite the legal authority for promulgating a Rule. *See* 5 U.S.C. § 553(b)(2). Defendants' authority for promulgating the public charge rule is granted by 8 U.S.C. § 1103(a)(1) and § 1182(a)(4)(A), both of which are, by Plaintiffs' admission, relied upon in both the NPRM and the Rule. Although the HSA informs the proper interpretation of those INA sections, it is the INA and not the HSA which provides the agency's legal authority. Moreover, contrary to Plaintiffs' contention, both the NPRM and the Rule cite the HSA, NPRM at fn. 17, Rule at fn. 14.

### C. DHS has statutory authority to impose public benefits conditions on applications and petitions for extensions of stays or changes of status.

Despite protestations that Defendants' argument "rings hollow," Plaintiffs do not seriously contest that the Rule's new *condition* is exactly that—a condition for approval of extension-of-stay and change-of-status applications by nonimmigrants. Opp'n at 39-40. Plaintiffs are wrong to suggest that the Rule imposes a public charge inadmissibility determination upon extension-of-stay and change-of-status applicants. Instead, DHS is using its ample statutory and regulatory authority in this sphere, NY Mot. at 27-28, to impose a new condition on non-immigrant

applications. Congress does not need to "amend[] the public charge provision to address benefits use by non-immigrants," Opp'n at 40, because the Rule does not apply the public charge inadmissibility provision to non-immigrants. The new conditions are consistent with the INA.

**D. Plaintiffs fail to state a claim that the Rule is impermissibly retroactive.**

Plaintiffs' arguments alleging retroactive effect of the Final Rule are baseless. First, Plaintiffs contend without any evidence whatsoever that because Defendants' forms request information about whether aliens have ever used public benefits, they must necessarily use that information to make public charge determinations. Opp'n 41. Not only is this claim entirely unsupported and specifically prohibited by the Rule, see 8 C.F.R. 212.22(b)(4)(i)(E), (c)(1)(ii), but it also ignores the special instructions on USCIS's website, which inform aliens that they need not provide certain information. Contrary to Plaintiffs' assertion, Opp'n at 41 n.28, aliens "need not report the application for, certification or approval to receive, or receipt of, certain non-cash benefits on the Form I-944 before Feb. 24, 2020." Special Instructions, http://www.uscis.gov/i-944, retrieved March 3, 2020. [15]

Second, consideration of aliens' credit scores and English proficiency is not impermissibly retroactive. Plaintiffs argue that the Rule is retroactive because it penalizes prior financial decisions contributing to these two factors. Opp'n at 41-42. But "a statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.'" *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269 n.24 (1994). After the Rule takes effect, immigration personnel will consider an

[15] Plaintiffs argue in a footnote that the Rule retroactively penalizes prior receipt of cash assistance because 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).

alien's operative credit scores and English language proficiency at the time of the public charge inquiry. Plaintiffs' attempt to distinguish *McAndrews v. Fleet Bank of Massachusetts, N.A.*, 989 F.2d 13 (1st Cir. 1993) does not demonstrate any impermissible retroactivity. Although the *McAndrews* court noted in that particular case that the relevant statute was triggered because of circumstances occurring after its enactment, the general rule is "that a statute may modify the legal effect of a present status or alter a preexisting relationship without running up against the retroactivity hurdle . . . So long as a neoteric law determines status solely for the purpose of future matters, its application is deemed prospective." *Id.* at 16. Here there is no dispute that the application of the Rule and consideration of the factors of which Plaintiffs complain apply exclusively to future public charge determinations. An alien's credit scores and English language proficiency at the time of his or her application is only considered as part of the totality of the circumstances of whether at any future time he or she is likely to become a public charge, and therefore the Rule does not have retroactive effect.

**E. Plaintiffs fail to state a claim that the Rule is contrary to PWRORA.**

Plaintiffs' opposition fails to meaningfully respond to Defendants' reasoning with regard to their claim that the Rule is contrary to PWRORA. As explained in Defendants' motion, the Rule neither impedes states' authority to expand the class of aliens eligible for Medicaid nor prevents eligible aliens from choosing to use Medicaid. NY Mot. 31. To the extent the Plaintiffs seek to represent the interests of the legislative branch, they have no standing to do so.

**F. The Plaintiffs fail to state a claim that the Rule is contrary to SNAP.**

Plaintiffs fail to state a claim that the Rule contravenes § 2017 of the SNAP statute, which states that the "value of [SNAP] benefits that may be provided . . . shall not be considered income or resources for any purpose under any Federal, State or local laws[.]" 7 U.S.C. § 2017(b). The Rule explicitly does not consider receipt of SNAP benefits as income or resources attributable to

alien applicants. Rule at 41375. Plaintiffs' argument reads out the deliberate use in § 2017(b) of the term "value" and reads in a limitation on "any purpose" to mean any purpose that would potentially limit an individual's use of public benefits. *See* Opp'n at 43-44. As discussed in Defendants' motions, the Rule is carefully drafted to prohibit consideration of the actual amount of SNAP benefits received by any alien subject to a public charge determination. Moreover, basic principles of statutory interpretation counsel that the word "value" in § 2017(b) should be given its ordinary meaning and that if Congress had intended to say that the *receipt* of SNAP benefits shall not be considered for any purpose it would have used that term. Plaintiffs' attempt to justify the reliance of the Lifeline regulation, 47 C.F.R. § 54.409, on the fact of receipt of SNAP benefits because it is a program that expands the availability of public benefits cannot be squared with their proposed interpretation of § 2017(b). The statute states that SNAP benefits shall not be considered for *any purpose* and therefore if Plaintiffs are correct that the statute prohibits not only consideration of the value but also the mere fact of receipt of SNAP benefits, SNAP can no more be relied on to expand eligibility for public benefits than to "penalize" individuals who use them.

### G. Plaintiffs Fail to State a Claim for Violation of the Rehabilitation Act.

Plaintiffs' complaint fails to state a claim that the Rule is contrary to law because it conflicts with the Rehabilitation Act, and their reformulation of that argument as a claim that the Rule is arbitrary and capricious fares no better. As explained in detail in Defendants' motions to dismiss, NY Mot. 28-30, MTR Mot. 30-32, the Rule does not conflict with § 504 because the INA requires Defendants to consider the health of aliens as part of the public charge determination, and because disability cannot be the sole reason for denial of adjustment of status under the totality of the

circumstances test required by the public charge statute. *See Natofsky v. City of New York*, 921 F.3d 337, 350-51 (2d Cir. 2019) (Section 504 imposes a "strict[] 'solely' causation standard.").[16]

The INA requires the health of each alien applicant to be assessed as part of the public charge determination, 8 U.S.C. § 1182(a)(4)(B)(i), and it is therefore Congress, not the Rule, that requires DHS to take this factor, including any disability, into account. A specific, later statutory command, such as that contained in the INA, supersedes section 504's general proscription to the extent the two are in conflict, which they are not in this case. *See*, *e.g.*, *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1353 (10th Cir. 1987); *Nutritional Health All. v. FDA*, 318 F.3d 92, 102 (2d Cir. 2003).

Indeed, the Rule is fully consistent with § 504 because it does not deny any alien admission into the United States, or adjustment of status, "solely by reason of" disability. 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 disability is one factor that may be considered in the totality of the circumstances, it is not dispositive, and is relevant only to the extent that an alien's particular disability tends to show that he is "more likely than not to become a public charge" at any time. Rule at 41368. 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.

Ignoring these controlling statutory requirements, Plaintiffs contend that the Rule violates § 504 because it does not consider whether an aliens' disability can be reasonably accommodated.

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[16] Plaintiffs' assertion that the Rule violates DHS's own regulations related to the Rehabilitation Act is equally unavailing. First, this claim was not made in Plaintiffs' complaint. Even if it had been properly alleged, the regulations in 6 C.F.R. 15.30 exist only to implement § 504, if the Rule does not violate the statute it cannot violate the regulations.

Opp'n at 55. However, the burden is on Plaintiffs and not Defendants to demonstrate that an appropriate reasonable accommodation exists, and they have not even attempted to do so. *See McElwee v. Cty. of Orange*, 700 F.3d 635, 642 (2d Cir. 2012). Even if Plaintiffs had proposed any possible accommodations, they would most likely require Defendants to transform the definition of public charge and the factors considered. "An accommodation is not reasonable if it . . . would fundamentally alter the nature of the . . . program." *Id.* at 641. Plaintiffs also claim that the Rule subjects aliens with disabilities to a more "onerous" public charge determination than aliens who do not have disabilities. However, as noted above, *all* aliens are required by statute to be assessed on the basis of their health, and any disability or condition will only be relevant to the totality of the circumstances inquiry to the extent it tends to show that an alien is more likely to become a public charge. Thus, all applicant aliens are subject to the same public charge determination wherein their individual attributes are carefully weighed in the totality of the circumstances. For the same reason, Plaintiffs' claim that the Rule irrationally assumes individuals with disabilities cannot be self-sufficient is unsupported. The Rule explicitly states that if "there is no indication that such disability makes the alien more likely to become a public charge, the alien's disability will not be considered an adverse factor in the inadmissibility determination," and that other positive factors showing self-sufficiency would be considered in the totality of the circumstances. Rule at 41368. Finally, Plaintiffs fail to state a claim that aliens with disabilities are subject to improper "double-counting" of "disability-related factors" such as Medicaid. Opp'n at 56. Such factors are considered in the analysis regardless of disability, and there is no evidence that disabled persons are likely to be found to be public charges *solely* because of their disability under the totality-of-the-circumstances determination.

## III. Plaintiffs Fail to State a Claim that the Rule is Arbitrary or Capricious.

As Defendants explained at length, NY Mot. at 32-39; MTR Mot. at 32-40, DHS's reasoning satisfies deferential arbitrary-and-capricious review. Most of Plaintiffs' arguments to the contrary reduce to a policy disagreement with DHS's line-drawing.

**A. The Rule's 12/36 Standard is Not Arbitrary or Capricious.**

Plaintiffs assert, for example, that the Rule's definition is arbitrary because in their view it would include aliens who use benefits in amounts that Plaintiffs deem "minimal." Opp'n at 45. But DHS determined that it could best achieve Congress's statutory purposes by setting a threshold of more than twelve months of enumerated benefits within a 36-month period. That standard is not met with "minimal" reliance on benefits, as Plaintiffs suggest. It was entirely rational for DHS to conclude that an individual who relies on public assistance for a significant amount of time to meet his or her basic needs should be defined as a public charge, particularly where Congress's statutory requirement that the inadmissibility ground apply to a person determined likely "at any time" to become a public charge indicates concern even with short periods of reliance on public assistance. *See* 8 U.S.C. § 1182(a)(4)(A); Rule at 41421-22. In any event, judgments about the amount of public benefits that render an alien a public charge are precisely the kind of issue Congress delegated to DHS. *See Thor Power Tool Co. v. Comm'r of Internal Review*, 439 U.S. 522, 540 (1979).

Plaintiffs similarly argue that the Rule is irrational because noncash public benefits promote rather than inhibit self-sufficiency as Plaintiffs would define the concept. Opp'n at 46. Yet it was Congress that expressly equated a lack of self-sufficiency with receipt of "public benefits," which it defined broadly to include the noncash benefits at issue here. 8 U.S.C. §§ 1601(2)-(4), 1611(c). For aliens, Congress's intent is that aliens should be self-sufficient before they seek admission or adjustment of status, not that they should someday attain self-sufficiency by drawing on public resources to improve their financial condition. Rule at 41308, 41421; *see* 8

U.S.C. § 1601. Contrary to Plaintiffs' suggestion, Opp'n at 46, DHS's choice to follow that policy cannot be characterized as irrational. *Judulang v. Holder*, 565 U.S. 42, 55-56 (2011); *see* Rule at 41352-53. Also, as Plaintiffs observe, some individuals may qualify for public benefits even though they have incomes above the poverty level. Opp'n at 46. But that does not make the Rule irrational. The fact that an individual must rely on public assistance to support himself or herself, notwithstanding his or her income level, indicates a lack of self-sufficiency.

Plaintiffs' assertion that the Rule's aggregate-counting of benefits is irrational is also incorrect. Opp'n at 50-51. DHS relied on various studies regarding patterns of benefits usage and determined that its definition (including the aggregate-counting framework) would "provide[] meaningful flexibility to aliens who may require one or more of the public benefits for relatively short periods of time, without allowing an alien who is not self-sufficient to avoid facing public charge consequences." Rule at 41360-61. Similarly, DHS explained that its aggregate-counting framework was designed to take into account that "receipt of multiple public benefits in a single month is more indicative of a lack of self-sufficiency," *id*. at 41361, and noted that a different approach would illogically "result[] in differential treatment" between aliens who rely on public benefits to similar degrees. *Id*. at 41361-62. DHS thus reasonably concluded that—despite any fringe hypothetical applications of the Rule—the Rule's "exercise in line-drawing" "appropriately balances the relevant considerations" and would provide more "meaningful guidance to aliens and adjudicators." *Id*. at 41360-61.

Lastly, Plaintiffs' belief that the "government's 'expenditures on non-cash benefits' do not reflect a problem for DHS to address," Opp'n at 46, ignores the fact that 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. *See* Opp'n at 24.

**B. The Rule Appropriately Considers Factors Relevant to a Public charge Analysis**

Plaintiffs' contentions that the Rule irrationally requires immigration officials to consider credit scores, English proficiency, and family size are meritless. Opp'n at 47-50. DHS reasonably determined that those characteristics would be relevant, in the totality of the circumstances, to several factors it is statutorily required to consider—*i.e.*, an alien's "assets, resources, and financial status," "education and skills," and "family status." 8 U.S.C. § 1182(a)(4)(B). Plaintiffs argue that such factors do not, on their own, indicate that a person is more likely than not to use public benefits. Opp'n at 47-49. But DHS said only that those characteristics are relevant in the totality of the circumstances, relying on statistics showing that low English proficiency and large family size make it more likely that a person will use public benefits, *see* NPRM at 51114, 51184-85, 51196.

DHS plainly explained its consideration of those factors. Although Plaintiffs assert, for example, that "DHS fails to provide any rational basis for considering credit scores in the public charge test," Opp'n at 49, the same passage that Plaintiffs cite explains at length why credit scores provide information that is relevant to an alien's financial resources, and provides an alternative way for adjudicators to proceed when aliens lack credit scores. NPRM at 51189. Similarly, DHS adequately explained that it would count health insurance acquired with credits under the Affordable Care Act as a generally positive factor, just not as a "heavily weighted" one, because the alien would be receiving "on a means-tested basis" a "government subsid[y] to fulfill a basic living need." Rule at 41449. Nothing in those explanations is unreasonable.[17]

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[17] Plaintiffs also claim that the Rule's consideration of English proficiency is arbitrary and capricious because of the position taken by a different agency, the Social Security Administration ("SSA"), in a different rulemaking. Opp'n at

Lastly, the possibility that certain factors may, in some cases, overlap does not make the Rule arbitrary or capricious. Opp'n at 50. It is highly unlikely that an evidence-based determination could be made without considering different kinds of evidence that would overlap in their tendency to demonstrate whether an individual is likely at any time to become a public charge. In any event, the Rule explains that overlapping factors do not necessarily carry more weight. Rather, "[m]ultiple factors operating together will carry more weight to the extent those factors in tandem show that the alien is more or less likely than not to become a public charge." Rule at 41397.

**C. DHS Adequately Considered Potential Harms from the Rule.**

Plaintiffs' argument that DHS "fail[ed] to adequately consider the magnitude of the harms and calculate the costs that will result from the Rule" is equally meritless. Opp'n at 51-53. As Plaintiffs' citations to the Rule demonstrate, *id.*, DHS explained the possible public-health risks, and even took steps to mitigate them by excluding certain benefits and recipients from the Rule's coverage. *See* Rule at 41384-85. That fact alone distinguishes the cases on which plaintiffs rely. Moreover, as the government explained, NY Mot. at 34-37; MTR Mot. at 38-40, DHS reasonably weighed those inherently uncertain possible costs against difficult-to-measure policy benefits. The APA required nothing more. *See San Francisco*, 944 F.3d at 800-05; *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019) (where the evidence calls for "value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty" the decisionmaker must only "consider the evidence and give reasons for his chosen course of action").

48 n.31. But SSA did not "project[] the likelihood of . . . individuals [with limited English proficiency] being hired for particular types of jobs . . . that would make the alien more likely to be self-sufficient;" it only considered whether "jobs exist in the national economy that . . . individuals [with limited English proficiency can] perform." 85 Fed. Reg. 10586, 10598 (2020). DHS appropriately found that English language proficiency is one of many factors "relevant in determining whether an alien is likely to become a public charge in the future," NPRM at 51195, and that proficiency in languages other than English can also be considered as a positive factor in that analysis, *see id*. at 51196. The Rule simply reflects the reality that, all else being equal, an individual who is proficient in more languages is more likely to obtain full employment and self-sufficiency, and that English proficiency is particularly relevant in that regard.

In arguing to the contrary, Plaintiffs misstate the law and DHS's conclusions. They label DHS's actions arbitrary because it predicted some reduction in benefits usage but failed to "quantify" the public-health effects that could result from it. Opp'n at 51. But under settled law, DHS only had to explain its uncertainty and its reasoning. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 104-06 (1983). DHS did so. Relatedly, Plaintiffs urge that DHS unjustifiably relied on a belief that the Rule "will ultimately strengthen" public health. Opp'n at 52 (quoting Rule at 41314). But DHS did not rely on that statement as a justification for the Rule. Rather, the agency justified the Rule on the ground that it better accords with congressional intent and national immigration policy. Rule at 41316-19.

Next, plaintiffs erroneously assert that DHS failed to provide a "reasoned explanation" for abandoning the 1999 Guidance. Opp'n at 52. As discussed in the motions, NY Mot. at 33-34; MTR Mot. at 33-34, DHS explained why it "believe[d] [the new policy] to be better," *FCC*, 556 U.S. at 515, which is all the law requires. DHS did not need to identify "negative consequences from the current public charge regime" to change its position, as Plaintiffs suggest. Opp'n at 52.

**D. DHS Reliance on Administrative Interpretations Does Not Show Any APA Violation**

Contrary to Plaintiffs' argument, DHS's citations to administrative decisions in *Matter of Vindman* and *Matter of Harutanian* do not render the Rule arbitrary or capricious. Opp'n at 53-54. As DHS explained, "neither of those decisions specifically limited the general understanding of public charge to only those who are 'elderly, unemployed or unsponsored' aliens." Rule at 41349. On the contrary, "[b]oth decisions were based on the understanding that Congress intended to exclude those who were unable to support themselves and who received public benefits." *Id*. The portion of those decisions quoted by Plaintiffs merely states that an alien's "physical and mental condition" affecting his or her "ability to earn a living" is of "major significance." Opp'n at 54.

Consistent with that, the Rule considers alien's relevant medical conditions as part of the totality of the circumstances. And, as noted in Defendants' motion, both decisions emphasized the Executive Branch's wide discretion to interpret the public charge definition. NY Mot. at 39. In any event, Plaintiffs' arguments miss the mark because the Rule does not rest exclusively on *Vindman* or *Harutanian*; rather, it is supported by numerous other authorities. *See* NPRM at 51157-58.

**IV. The Rule Does Not Violate Equal Protection.**

To state an equal protection claim, Plaintiffs rely on a bare allegation that the Rule was issued with the intent of affecting a particular sub-group, and a string of generic quotations regarding immigration—none of which specifically reference the Rule, or explain why DHS issued the Rule. These allegations are insufficient.

An equal protection claim requires "[p]roof of racially discriminatory intent or purpose." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). Plaintiffs must establish that "the decision maker"—here, the Acting Secretary of Homeland Security—issued the Rule "at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Grimes By & Through Grimes v. Sobol*, 832 F. Supp. 704, 708 (S.D.N.Y. 1993). Plaintiffs, however, do not address the Rule's complex procedural history, all of which undermines Plaintiffs' theory that the Rule's design and implementation were motivated by any animus towards a racial sub-group. DHS initially published a 183-page Notice of Proposed Rulemaking concerning the public charge ground of inadmissibility, which identified in great detail the general rationale behind the proposed rule (*e.g.*, to incentivize self-sufficiency), and the rationale for each component of the proposed rule. After receiving and considering public comments on the proposed rule, DHS issued the Rule, which included a number of modifications in response to the public

comments. The Rule's preamble is over two hundred pages long, and includes an exhaustive explanation of DHS's rationale for the Rule's final design. This history undermines Plaintiffs' assertion that the Rule's design and implementation were somehow driven by improper motives, rather than the legitimate reasons set forth by DHS in the Rule itself. *See Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 275-79 (1979) ("the [stated] purposes of the [rule] provide the surest explanation for its" implementation).

To show that the Rule was intended, in part, to harm a certain racial sub-group, Plaintiffs rely on a string of generic quotations concerning immigration, almost all of which are from non-DHS personnel. Plaintiffs contend—invoking the "cat's paw" theory—that statements from non-decisionmakers are relevant since "where high-level officials who 'influence[] or manipulate[]' the decision-makers express racial animus, such statements are relevant to review of agency action." Opp'n at 58. But the Second Circuit has already suggested that the cat's paw theory—which is derived from agency principles that generally apply to *statutory* claims—does not apply to constitutional claims.[18] *See Naumovski v. Norris*, 934 F.3d 200, 221-22 (2d Cir. 2019) ("[W]hile the Supreme Court instructs that traditional agency principles can determine liability under Title VII, no comparable vicarious liability applies to claims brought under § 1983 . . . Section 1983 claims for discrimination" thus "cannot be based on a . . . 'cat's paw' theory to establish a

[18] Additionally, courts must apply a "deferential standard" when reviewing the government's "broad power" over the "administration of the immigration system," and thus generally do not "probe and test the justifications of immigration policies" if the policies are "facially legitimate and bona fide." *Trump v. Hawaii*, 138 S. Ct. 2392, 2419-20 (2018). Plaintiffs argue that *Hawaii*'s deferential standard applies only to cases involving "foreign nationals seeking entry" into the U.S., and cases involving "national security determinations." Opp'n at 57. Although *Hawaii* noted that the "narrow standard of review has particular force in admission and immigration cases" involving "national security," it made clear that this standard applies "across different contexts and constitutional claims." 138 S. Ct. at 2419. And its analysis was grounded in its recognition that "the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Id.* at 2418. There is no dispute that this case directly implicates the government's policies regarding the admissibility of aliens. The highly deferential standard from *Hawaii* therefore controls here, and Plaintiffs have failed to plead facts plausibly suggesting a violation of law under that standard.

defendant's liability."). At the very least, this Court should not blithely extend that doctrine to a Cabinet Secretary acting under an oath to uphold the Constitution and entitled to the presumption of regularity. Additionally, the few alleged quotations from individuals affiliated with DHS are too generic, and say nothing of why they supported the Rule. *See*, *e.g.*, *Make The Road NY v. Cuccinelli*, 19-cv-7993, Compl., ECF No. 1, ¶¶ 227-28,. Nor do they suggest that the Rule is "inexplicable by anything but animus," as required to show a violation under the *Hawaii* standard.[19] 138 S. Ct. at 2420-21. Plaintiffs have thus failed to state a plausible claim that any of the quotations at issue were an intended and proximate cause of the former Attorney General's decision. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 419 (2011).

## CONCLUSION

For the reasons stated above and in the Defendants' motions, the Court should dismiss Plaintiffs' complaints.

Dated: March 6, 2020

Respectfully submitted,

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[19] Plaintiffs argue, incorrectly, that the Rule nonetheless fails the rational basis test. First, if Plaintiffs fail to establish that the Rule was motivated by a discriminatory purpose, their equal protection claim fails; the Court need not then apply the rational basis test (or any other test). Supreme Court precedent makes clear that if a plaintiff challenges a facially neutral rule, it cannot prevail unless it establishes a "discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Regardless, even if Defendants had to establish a rational basis for any unintentional discriminatory impact, the Rule itself—which is facially neutral—lays out its basis: to incentivize self-sufficiency among all aliens. This is sufficient to withstand rational basis scrutiny. *See Smith v. Defendant A*, No. 08 CIVDLC, 2009 WL 1514590, at *4 (S.D.N.Y. May 29, 2009) ("Rational basis review is highly deferential toward the government, whose actions are considered presumptively rational and must be upheld if 'there is any reasonably conceivable state of facts that could provide a rational basis for the classification' . . . the burden is ultimately on the plaintiff to negate 'every conceivable basis which might support' the" policy).

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