UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, CITY OF NEW YORK, STATE OF CONNECTICUT, and STATE OF VERMONT, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY; KEVIN K. McALEENAN, *in his official capacity as Acting Secretary of the United States Department of Homeland Security*; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; KENNETH T. CUCCINELLI II, *in his official capacity as Acting Director of United States Citizenship and Immigration Services*; and UNITED STATES OF AMERICA, Defendants.	**CIVIL ACTION NO. 19 Civ. 07777 (GBD)**
MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, ASIAN AMERICAN FEDERATION, CATHOLIC CHARITIES COMMUNITY SERVICES, and CATHOLIC LEGAL IMMIGRATION NETWORK, INC., Plaintiffs, v. KEN CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services; UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES; KEVIN K. McALEENAN, in his official capacity as Acting Secretary of Homeland Security; and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendants.	**CIVIL ACTION NO. 19 Civ. 07993 (GBD)**

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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Plaintiffs the States of New York, Connecticut, Vermont, and the City of New York (the "Governmental Plaintiffs") and Make the Road New York ("MRNY"), African Services Committee ("ASC"), Asian American Federation ("AAF"), Catholic Charities Community Services (Archdiocese of New York) ("CCCS-NY"), and Catholic Legal Immigration Network, Inc. ("CLINIC") (the "Organizational Plaintiffs," and together with Governmental Plaintiffs, "Plaintiffs") submit this opposition to Defendants' motions to dismiss their respective actions. Defendants' motions to dismiss seek a third bite at the apple, proffering arguments that this Court has already twice rejected. As Defendants offer no new substantive arguments, and this Court has already evaluated and rejected Defendants' contentions under the more stringent standards governing entry of a preliminary injunction, Defendants' motions should be denied.

PRELIMINARY STATEMENT

Defendants fail to demonstrate why they should succeed on their motions to dismiss when Plaintiffs have already prevailed at the more rigorous preliminary injunction stage.[1] In granting Plaintiffs' motions for preliminary injunction, the Court has already engaged in a detailed analysis of Plaintiffs' standing, ripeness, and the merits of Plaintiffs' claims, holding that Plaintiffs are likely to prevail on their challenge to the public charge rule (the "Rule"), 84 Fed. Reg. 41,292 (Aug. 14, 2019). *See N.Y. v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 351 (S.D.N.Y. 2019); *Make the Road New York v. Cuccinelli*, 2019 WL 5484638, at *12 (S.D.N.Y. Oct. 11, 2019). This Court subsequently reaffirmed those conclusions, denying Defendants' motions to stay the Court's preliminary injunctions pending resolution of Defendants' appeal of those orders. *See N.Y. v. U.S. Dep't of Homeland Sec.*, 2019 WL 6498250,

[1] Contrary to Defendants' contentions, Gov't Mot. 1; MRNY Mot. 1, the Supreme Court, in staying the injunction pending appeal, took no position as to whether Defendants were likely to succeed on the merits or that Plaintiffs would not suffer irreparable harm. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020).

at *2-3 (S.D.N.Y. Dec. 2, 2019); *MRNY v. Cuccinelli*, 2019 WL 6498283, at *2-3 (S.D.N.Y. Dec. 2, 2019). Where the Court has already issued a preliminary injunction, Defendants' arguments are "are *ipso facto* insufficient to support dismissal of the complaint." *Alibaba Grp. Holding Ltd. v. Alibabacoin Found.*, 2018 WL 5831320, at *1 (S.D.N.Y. Nov. 7, 2018) ("[E]ntry of a preliminary injunction entails a 'higher standard . . . than the standard a court applies in considering a motion to dismiss.'").

Defendants now move to dismiss Plaintiffs' complaints under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). *See* Mot. to Dismiss, Gov't Dkt. 139; Mot. to Dismiss, MRNY Dkt. 176. Where, as here, "the Rule 12(b)(1) motion is facial, *i.e.*, based solely on the allegations of the complaint . . . [Plaintiffs] ha[ve] no evidentiary burden" and "[t]he task of the district court is to determine whether the [complaint] alleges facts that affirmatively and plausibly suggest[s] that [Plaintiffs have] standing to sue." *Carter v. HealthPort Technologies, LLC*, 822 F.3d 47, 56 (2d Cir. 2016) (alterations and internal quotation marks omitted). Under Rule 12(b)(6), "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). Courts must "accept all factual allegations in the . . . complaint as true, and draw all reasonable inferences in [Plaintiffs'] favor." *Rich v. Fox News Network, LLC*, 939 F.3d 112, 117 n.2 (2d Cir. 2019) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002)) (alterations and internal quotation marks omitted). Just as this Court concluded that Plaintiffs are likely to succeed on the merits of their claims, it should conclude that Plaintiffs have sufficiently stated claims for relief under both Rules 12(b)(1) and 12(b)(6). The Court should deny Defendants' motions to dismiss.

BACKGROUND

I. History of "Public Charge"

Throughout its history, "public charge" has become a term of art in immigration law that has a settled, and narrow, definition. It has never meant a person who is relatively low-income, which is the meaning reflected in the Rule. Nor has it ever encompassed every individual who receives any public benefit. To the contrary, both early state laws and ultimately Congress welcomed the admission of such individuals and provided for their public support, recognizing that such immigrants make important contributions to this country and its economy, and that public investment in their well-being and productivity was worthwhile. Since the term "public charge" first was codified into U.S. immigration law as part of the Immigration Act of 1882, it has been interpreted and applied narrowly by courts and agencies to refer to only a small number of noncitizens who are unable to care for themselves, and accordingly are likely to be institutionalized or otherwise primarily dependent on the government for long-term subsistence. Congress has repeatedly approved this narrow interpretation, most recently in 1996. Congress has never authorized the Executive to redefine "public charge" to refer to people expected to receive any amount of supplemental benefits that are used by many millions of working Americans, (*i.e.*, people who may face a temporary period of financial strain at some point in their lives), regardless of their ability to work and care for themselves.

A. The Original Meaning of "Public Charge" Referred to a Narrow Class of Persons Unable to Care for Themselves

The term "public charge" first appeared in federal immigration law in the Immigration Act of 1882, 47th Cong. ch. 376, 22 Stat. 214, § 2, which provided that "any person unable to take care of himself or herself without becoming a public charge" could be denied admission to the United States. Later enactments adopted the current phrasing: "likely to become a public

charge." *E.g.*, 1891 Immigration Act, 51st Cong. ch. 551, 26 Stat. 1084, § 1, *See* Compl., Gov't Dkt. 1 ("Gov't Compl.") ¶ 31; Compl., MRNY Dkt. 1 ("MRNY Compl.") ¶¶ 60-61. The statute applies both to noncitizens seeking admission and to those already residing in the United States and seeking to adjust their status to that of lawful permanent resident. *See* 8 U.S.C. §§ 1182(a)(4)(A);1255(a). "The 1882 act did not consider an alien a 'public charge' if the alien received merely some form of public assistance." *City & Cty. of S.F. v. USCIS*, 944 F.3d 773, 793 (9th Cir. 2019) ("*San Francisco*"). Instead, in enacting the 1882 Act, Congress intended "public charge" to refer to those likely to become long-term residents of "poor-houses and alms-houses"—*i.e.*, persons who were institutionalized and wholly dependent on the government for subsistence. Gov't Compl. ¶ 26; MRNY Compl. ¶ 62 (citing 13 Cong. Rec. 5109 (June 19, 1882) (statement of Rep. Davis)).

The 1882 Act built on earlier state and local laws that had confirmed the common law understanding of "public charge" as individuals "incompetent to maintain themselves" or "permanently disabled," and "not merely destitute persons, who, on their arrival here, have no visible means of support."[2] *City of Boston v. Capen*, 61 Mass. 116, 121-22 (1851); *see* MRNY Compl. ¶ 63. Contemporaneous dictionary definitions fell along the same lines. *See* MRNY Compl. ¶ 63. Congress incorporated this principle into the 1882 Act, which expressly recognized that some immigrants who were not to be excluded as likely public charges might nonetheless need short-term public assistance. The Act established an "immigrant fund" to provide assistance for immigrants who, while not excludable as likely public charges, might require temporary "care" and "relief" "until they can proceed to other places or obtain

[2] The early cases Defendants cite to refute this view do not undermine it. For example, *In re Day*, 27 F. 678 (C.C.S.D.N.Y. 1886) (cited in Gov't Mot. 18; MRNY Mot. 18), involved eight children who had been detained in the UK as truants, and arrived in the United States without parents or relative, meaning that no person would be responsible for their support other than the state.

occupation for their support." 22 Stat. 214, § 1; *see* 13 Cong. Rec. 5106 (June 19, 1882) (statement of Rep. Reagan). In doing so, it recognized that such immigrants, despite their lack of wealth, contributed to the economy and could "become a valuable component part of the body-politic." 13 Cong. Rec. 5108 (June 19, 1882) (statement of Rep. Van Voorhis).

Consistent with Congress's intent that a temporary need for public assistance would not render an immigrant a public charge, the Supreme Court, in its only decision construing the public charge provision, determined that a group of "illiterate laborers" who did not speak English, had only $65 in their possession, and intended to move to an area where they were unlikely to find employment could not be excluded on public charge grounds. *Gegiow v. Uhl*, 239 U.S. 3, 8-9 (1915). *See* Gov't Compl. ¶ 28; MRNY Compl. ¶ 64. The Court explained the provision was intended only to exclude immigrants "on the ground of permanent personal objections accompanying them," rather than those who might be unable to find work.[3] *Id.* at 10. The Second Circuit's decisions from the same period likewise found the provision to apply only to "persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future." *Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917); *accord Wallis v. Mannara*, 273 F. 509, 511 (2d Cir. 1921) (public charge means individuals unlikely "to earn a living").

B. Administrative Decisions for Nearly a Century Affirm That Mere Receipt of Public Benefits Does Not Render the Recipient a Public Charge

The original meaning of "public charge" remained in place throughout the twentieth century. In the leading case of *Matter of B-*, 3 I. & N. Dec. 323 (B.I.A. 1948), the Board of

[3] Defendants suggest that revisions to the statute in 1917 that moved the term "public charge" from its prior position between "paupers" and "professional beggars" were meant to overrule *Gegiow*. MRNY Mot 21-22; Gov't Mot. 20-21. But subsequent courts held that these revisions did not affect the term's meaning as someone primarily dependent on the government for subsistence. *See Ex Parte Mitchell*, 256 F. 229, 230-32 (N.D.N.Y. 1919) (citing *Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917)); *United States ex rel. Mantler v. Comm'r of Immigration*, 3 F.2d 234, 235-36 (2d Cir. 1924).

Immigration Appeals ("BIA") held that "acceptance by an alien of services provided by a State . . . to its residents, . . . does not in and of itself make the alien a public charge." *Id.* at 324. *See* MRNY Compl. ¶ 68. The holding in *Matter of B-* has been the law for more than 70 years, as administrative decisions have consistently focused on the noncitizen's ability to work and care for herself, not the mere receipt of public benefits. *See, e.g.*, *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (B.I.A. 1962; A.G. 1964) (finding that noncitizen is not likely to become a public charge, although he had falsified an offer of employment, completely lacked of English fluency, and had only $50 in assets because he was young, had work experience, and had family in U.S. willing to assist him and also stating "the [INA] requires more than a showing of a possibility that the alien will require public support" in public charge determination); *Matter of Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974) ("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.").[4]

Defendants assert that *Matter of B-* shows that "the Executive Branch has taken the authoritative position that an alien may qualify as a 'public charge'" if the individual or their sponsor fails to repay a benefit upon demand, "regardless of whether the alien was 'primarily dependent' on the benefits at issue." Mem. of Law in Supp. of Mot. to Dismiss, Gov't Dkt. 141 ("Gov't Mot.") 14-15; Mem. of Law in Supp. of Mot. to Dismiss, Gov't Dkt. 177 ("MRNY Mot.") 15. But contrary to Defendants' characterization, nothing in the opinion suggests that receipt of even a small amount of temporary or incidental benefits would be sufficient to render a

[4] *See also Matter of A-*, 19 I. & N. Dec. 867, 870 (B.I.A. 1988) (finding that a noncitizen is not likely to be a public charge in light of her age and ability to earn a living despite the fact she and her spouse had been unemployed for four years and her family received cash assistance); *cf. Matter of Vindman*, 16 I. & N. Dec. 131, 132 (B.I.A. 1977) (finding that noncitizens are likely to become public charges because they were 66 and 54 years old, had received cash assistance for the past three years, and were unemployed with no future prospects); *Matter of Harutunian*, 14 I. & N. Dec. 583, 590 (B.I.A. 1974) (finding that a 70-year old noncitizen who was reliant on state old age assistance was inadmissible on public charge grounds where she "lacks means of supporting herself, . . . has no one responsible for her support and . . . expects to be dependent for support on old age assistance."). *See* MRNY Compl. ¶ 70; Gov't Compl. ¶¶ 29 n.8, 57 n.11.

person a public charge. That issue was not even presented because the respondent in that case was a long-term resident of a state mental institution.

In keeping with the narrow scope of "public charge," federal immigration officials have excluded only a minuscule percentage of arriving immigrants on public charge grounds. The Department of Homeland Security's ("DHS") own data shows that of the 21.8 million immigrants admitted to the United States as lawful permanent residents between 1892 and 1930, less than one percent were deemed inadmissible on public charge grounds. Gov't Compl. ¶ 126; MRNY Compl. ¶ 65. The same has been true since. Between 1931 and 1980 (the last year for which DHS published such data), only 13,798 immigrants were excluded on public charge grounds out of more than 11 million admitted as lawful permanent residents—an exclusion rate of about one-tenth of one percent. MRNY Compl. ¶ 65.

Defendants also assert that the definitions of "public charge" in the 1933 and 1951 editions of Black's Law Dictionary, and a 1929 immigration treatise (Arthur Cook *et al.*, Immigration Laws of the U.S. § 285 (1929)) show that receipt of any amount of public benefits historically rendered the recipient a public charge. *See* Gov't Mot. 17-19; MRNY Mot. 17-19 But all three of these sources rely on a single case, *Ex Parte Kichmiriantz*, 283 F. 697 (N.D. Cal. 1922), which does not support Defendants' position. In *Kichmiriantz*, the noncitizen had been "committed to the Stockton State Hospital for the insane" within five years of admission, and the physician's report noted that he "would starve to death within a short time, as he is unable to care for himself in any way." *Id.* at 697-98. The court found him *not* to be a public charge because his family covered the cost of his "care and maintenance." *Id.* at 698. *Kichmiriantz* reflects the consistent historical focus of the term on those unable to care for themselves and without other support. *See id.*

C. Congress Has Approved Administrative Interpretations by Repeatedly Reenacting the Public Charge Provisions of the INA Without Relevant Change

Congress has approved these judicial and administrative interpretations of "public charge" by repeatedly reenacting the statute without material change. In 1952, four years after *Matter of B-* was decided, Congress reenacted the public charge inadmissibility provision in the Immigration and Nationality Act of 1952 ("INA") without purporting to change its interpretation. Pub. L. No. 82-414, § 212(a)(15), 66 Stat. 163, 183. *See* Gov't Compl. ¶ 36; MRNY Compl. ¶ 69.[5]

Almost 40 years later, in the Immigration Act of 1990, Congress again reenacted the public charge provision without material change. Pub. L. No. 101-649, §§ 601-03, 104 Stat. 4978, 5067-85. Gov't Compl. ¶ 64; MRNY Compl. ¶ 72. The legislative history of the 1990 Act noted that courts had associated likelihood of becoming a public charge not by reference to receipt of benefits, but to "destitution coupled with an inability to work." Staff of the H. Comm. on the Judiciary, 100th Cong., Grounds for Exclusion of Aliens Under the Immigration and Nationality Act: Historical Background and Analysis 121 (Comm. Print 1988). Again, Congress declined to depart from that definition. *See* MRNY Compl. ¶ 72.

In 1996, Congress yet again chose not to disturb the settled meaning of "public charge" in two major pieces of legislation that otherwise addressed noncitizen use of public benefits and public charge determinations. In the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Congress restricted noncitizens' eligibility for certain federal

[5] Defendants cite a statement in a 1950 Senate report stating 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 . . ." S. Rep. No. 81-1515, at 349 (1950) (quoted in Gov't Mot. 2; MRNY Mot. 2). But that statement on its face reflects only Congress's recognition of the fact-specific nature of public charge determinations. Nothing in the report suggests that Congress intended to authorize an executive agency to redefine the statutory term "public charge" itself far beyond its understood meaning.

benefits. Pub. L. No. 104-193, § 403, 110 Stat. 2105 (1996) (codified at 8 U.S.C. § 1613). *See* Gov't Compl. ¶ 44; MRNY Compl. ¶ 74. But, following the passage of PRWORA and subsequent legislation, which amended PRWORA and expanded access to benefits for noncitizens, many noncitizens remain eligible for federal benefits, including Medicaid and SNAP, and states are authorized to provide benefits to many others. *See generally* 8 U.S.C. §§ 1612-13. *See* Gov't Compl. ¶¶ 44-45; MRNY Compl. ¶ 74. As Defendants note, PRWORA's statement of policy provides that noncitizens "not depend on public resources to meet their needs," 84 Fed. Reg. at 41,294 (quoting 8 U.S.C. § 1601(2)(A)). But Congress has plainly concluded that allowing noncitizens to receive certain benefits is consistent with that purpose. *See* Gov't Compl. ¶ 45; MRNY Compl. ¶ 75.

The second relevant statute enacted in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), likewise did not overturn the settled interpretation of the INA's public charge provisions. *See* Pub. L. No. 104-208, § 531, 110 Stat. 3009 (1996) (amending 8 U.S.C. § 1182). *See* Gov't Compl. ¶ 40; MRNY Compl. ¶ 77. The statute, enacted one month after PRWORA, amended the public charge admissibility provision only to codify the existing standard that a public charge determination should be based on the "totality of the circumstances" and should take account of the applicant's age; health; family status; assets, resources, and financial status; and education and skills. *See* 8 U.S.C. § 1182(a)(4)(B)(i). IIRIRA also required many noncitizens seeking admission or adjustment of status to obtain an enforceable affidavit of support. *See id.* §§ 1182(a)(4)(B)(ii), (C)(ii); 1183a. Gov't Compl. ¶ 40; MRNY Compl. ¶ 78. Congress otherwise reenacted the public charge admissibility provision without change. Gov't Compl. ¶ 40; MRNY Compl. ¶¶ 77, 79.

Congress's decision not to expand the settled meaning of "public charge" in either of the

1996 statutes was not an oversight. In enacting IIRIRA, Congress expressly considered and rejected a proposal that would have defined public charge for purposes of removal to include noncitizens who receive certain benefits—including Medicaid, food stamps, and any other needs-based benefits—for more than 12 months. *See* Immigration Control & Financial Responsibility Act of 1996, H.R. 2202, 104th Cong. § 202 (1996); Gov't Compl. ¶ 41; MRNY Compl. ¶ 81. The proposed amendment passed the House but was withdrawn in the Senate under threat of Presidential veto. *See* 142 Cong. Rec. S11872, S11881-82 (1996) (statement of Sen. Kyl); MRNY Compl. ¶ 83. Contrary to Defendants' unsupported assertion that the proposed amendment was rejected out of concern it would restrict the executive branch's power to define "public charge," Gov't Mot. 16; MRNY Mot. 16, the legislative history shows that opposition to the amendment was based on the view that its definition of "public charge" was overbroad and unduly harsh.[6] *See* Gov't Compl. ¶ 39; MRNY Compl. ¶ 82.

In 2013, Congress again rejected efforts to redefine public charge to include anyone who received means-tested public benefits. During deliberations on the proposed Border Security, Economic Opportunity, and Immigration Modernization Act, a bill that sought to create a path to citizenship for noncitizens who could show they were "not likely to become a public charge," Senator Jefferson B. Sessions sought to amend the definition of "public charge" to include receipt of "non-cash employment supports such as Medicaid, the SNAP program, or the Children's Health Insurance Program." S. Rep. No. 113-40, 42 (2013); *see id.* at 63. The proposed amendment was rejected because of the bill's "strict benefits restrictions and

[6] The two pieces of legislative history Defendants cite do not support their argument. Gov't Mot. 16; MRNY Mot. 16. One is a Committee Conference Report issued *before* the expanded public charge provision was removed from IIRIRA that does not mention the President. *See* H.R. Rep. No. 104-828, at 241 (1996). The other is a congressional debate from the day the bill was enacted that simply says the expanded provision was "dropped" during negotiations after the "administration threatened to veto" the bill. *See* 142 Cong. Rec. S11881-82.

requirements." S. Rep. No. 113-40, at 42. *See* Gov't Compl. ¶¶ 42, 130; MRNY Compl. ¶ 84.

D. Administrative Field Guidance from 1999 Confirmed the Settled Interpretation of Public Charge

In 1999, three years after the passage of PRWORA and IIRIRA, and under the administration of the same President who signed them into law, the Immigration and Naturalization Service ("INS," the predecessor agency to Defendant U.S. Citizenship and Immigration Services ("USCIS")) issued its Field Guidance on Deportability and Inadmissibility on Public Charge Grounds ("Field Guidance"), 64 Fed. Reg. 28,689 (May 26, 1999), and a parallel proposed regulation, 64 Fed. Reg. 28,676 (May 26, 1999). Gov't Compl. ¶¶ 50-51; MRNY Compl. ¶ 86. INS explained that the Field Guidance "summarize[d] longstanding law with respect to public charge," and provided "new guidance on public charge determinations" in light of the recent legislation. 64 Fed. Reg. at 28,689. Defendants have cited no contemporaneous evidence questioning INS's interpretation of PRWORA or IIRIRA. The Field Guidance remained in effect until it was superseded by the Rule on February 24, 2020.

The Field Guidance reaffirmed the agency's longstanding approach to public charge as one focused on the ability of noncitizens to support themselves. It defined "public charge" as a noncitizen "who is likely to become (for admission/adjustment purposes) 'primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.'" *Id*. And it excluded from consideration in public charge determinations receipt of supplemental benefits such as Medicaid, SNAP, and housing assistance because those benefits "are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or family." *Id*. at 28,692. INS explained that these benefits are not the equivalent of subsistence-level support, but instead reflect Congress's "broad public

policy decisions" about improving health and upward mobility for middle- and low-income individuals. *Id*. Defendants assert that the Field Guidance "dramatically narrowed the public charge inadmissibility ground," Gov't Mot. 3; MRNY Mot. 3, but they ignore INS's unequivocal statement that the definition of "public charge" used in the Field Guidance was consistent with the agency's "past practice" and "longstanding law." 64 Fed. Reg. at 28,689, 28,692.

II. DHS's "Public Charge" Rule

DHS issued the proposed Rule for notice and comment on October 10, 2018. 83 Fed. Reg. 51,114 ("NPRM"). More than 260,000 comments were submitted, the "vast majority" of them in opposition. 84 Fed. Reg. at 41,297. The Rule, largely rejecting those comments, was published in the Federal Register on August 14, 2019. *See id*. at 41,292. After this Court's preliminary injunction was stayed, the Rule went into effect on February 24, 2020.

A. The Rule

The Rule defines "public charge" to mean any person who receives any amount of specified "public benefits" for more than 12 months in any 36-month period. 8 C.F.R. § 212.21(a). Receipt of two benefits in one month counts as two months. Thus, a person could be deemed a public charge for participating in four separate benefit programs for three months in any three-year period, such as might occur after a sudden loss of employment or onset of a serious medical condition. *Id*. It defines "public benefit" to mean cash benefits or benefits from specified noncash programs that offer short-term or supplemental support to eligible recipients, including SNAP, federal Medicaid (with certain exclusions, *see* 8 C.F.R. § 212.21(b)(5)), Section 8 Housing Assistance, Section 8 Project-Based Rental Assistance, and Public Housing under Section 9 of the U.S. Housing Act of 1937. 8 C.F.R. § 212.21(b).

Plaintiffs have alleged that receiving these noncash benefits does not connote destitution or a lack of self-sufficiency. On the contrary, these benefits are widely used by working families

and are available to many individuals and families with incomes well above the poverty level. Gov't Compl. ¶¶ 56, 74; MRNY Compl. ¶¶ 3, 116. Indeed, INS explicitly excluded these benefits from public charge considerations because they "are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient." 64 Fed. Reg. at 28,692.

The Rule creates a complex and confusing scheme of positive and negative "factors," including "heavily weighted" factors, for USCIS to consider in determining whether someone is likely to become a public charge (the "public charge test"). 8 C.F.R. § 212.22. The factors focus overwhelmingly on the applicant's income and financial resources. The strong correlation between these factors (such as low income, low credit score, or a medical condition requiring extensive medical treatment and lack of private health insurance) leads to a snowball effect in which a single characteristic—low income or limited means—triggers multiple negative factors, making a public charge finding virtually inevitable even when the applicant is employed. The Rule also weighs negatively factors unrelated to a person's financial resources, such as limited English ability and credit score. Additionally, the Rule imposes, for the first time in the agency's history, a new public charge determination for individuals, such as students, tourists, and certain guest workers, seeking to extend or change their non-immigrant visas. 8 C.F.R. § 214.1.

This would dramatically increase the number of persons potentially deemed a public charge. Illustratively, a study submitted to DHS during the notice-and-comment process showed that between 40 and 50 percent of U.S.-born individuals covered by a 2015 survey participated in one of the listed benefit programs between 1998 and 2014. Gov't Compl. ¶ 126; MRNY Compl. ¶ 103. Defendants have not challenged these estimates, or supported the notion that Congress

would endorse such an expansive definition of "public charge." MRNY Compl. ¶ 104.

B. The Rule's Development

The Rule originated in a wide-ranging policy proposal published in April 2016 by the Center for Immigration Studies ("CIS"), a far-right group founded by white nationalist John Tanton and dedicated to restricting immigration. It urged using the public charge doctrine "to reduce the number of welfare-dependent foreigners living in the United States." MRNY Compl. ¶¶ 91-92. Within a week of President Trump's inauguration, a draft of an Executive Order was leaked to the press that, among other things, sought to implement the CIS proposal by directing DHS to issue new rules defining "public charge" to include any person receiving any means-tested public benefits. MRNY Compl. ¶ 93.

Although the draft Executive Order was never signed, DHS, in a process driven by the White House, began drafting the Rule to implement the same policy. The White House directed agency officials that "**the decision of whether to propose expanding the definition of public charge, broadly, has been made at a very high level and will not be changing**" (emphasis in original). MRNY Compl. ¶ 196. Senior Advisor Stephen Miller, President Trump's principal advisor on immigration policy, exerted pressure on DHS to promulgate the public charge rule quickly and according to the President's design. *See* MRNY Compl. ¶ 218 & nn.98-102.

C. Consequences of the Rule

The Rule will cause grave harm to immigrant communities across the country. Defendants concede that noncitizens will forgo $1.5 billion in federal benefits, and more than $1 billion in state benefits, every year, because of the Rule. DHS, Economic Analysis Supplemental Information for Analysis of Public Benefits Programs, at 7 & Table 5; Regulatory Impact Analysis, Inadmissibility on Public Charge Grounds, at 10-11 & Table 1. *See* MRNY Compl. ¶ 242 & nn.134-35. Studies from the Migration Policy Institute, Fiscal Policy Institute, and

Manatt Health, among others, provide estimates that are many times greater. *See* MRNY Compl. ¶ 244 & nn.137-39 (listing public comments submitted to DHS that referenced each of these studies). Defendants concede that, as a result, the Rule would cause "[w]orse health outcomes," "[i]ncreased use of emergency rooms," "[i]ncreased prevalence of communicable diseases," "[i]ncreased rates of poverty and housing instability," and "[r]educed productivity and educational attainment." 83 Fed. Reg. at 51,270. *See* MRNY Compl. ¶ 246.

Plaintiffs allege that the Rule will have vast impacts on public health, homelessness, and food insecurity, among other ills.[7] *See* Gov't Compl. ¶¶ 194-211; MRNY Compl. ¶¶ 247-50. Children in particular—including U.S.-citizen children of noncitizen parents—will lose access to programs that support healthy development. Numerous studies have found that children who lack these basic needs will feel repercussions throughout their lives, as they perform worse in school and suffer adverse health consequences. *See* Gov't Compl. ¶¶ 199, 204, 211; MRNY Compl. ¶ 251. Vulnerable populations such as the elderly and disabled persons will similarly suffer particular adverse impacts. *See* Gov't Compl. ¶ 253-54; MRNY Compl. ¶ 252.

ARGUMENT

I. Plaintiffs' Claims are Justiciable

Defendants' Motions to Dismiss rehash threshold justiciability arguments that this Court has repeatedly rejected. *See New York*, 408 F. Supp. 3d at 344; *MRNY*, 2019 WL 5484638, at *5; *New York*, 2019 WL 6498250, at *3 (denying stay of injunction pending appeal); *MRNY*, 2019 WL 6498283, at *3 (same). Yet Defendants proffer the same arguments yet again. The result should be the same.

[7] These allegations are further supported by the declarations of Plaintiffs' experts submitted in support of the motions for preliminary injunction. *See generally* Schanzenbach Decl., MRNY Dkt. 40, Gov't Dkt. 34-16; Allen Decl., MRNY Dkt. 41, Gov't Dkt 34-1; Ku Decl., MRNY Dkt. 42, Gov't Dkt. 34-11; Van Hook Decl., MRNY Dkt. 45.

A. Plaintiffs Have Standing

1. The Governmental Plaintiffs Have Standing

The Governmental Plaintiffs have standing to assert their claims. Plaintiffs here have made out far more than the mere "facial plausibility" required to survive a motion to dismiss. *See Brown v. Daikin Am. Inc.*, 756 F.3d 219, 225 (2d Cir. 2014). As the Court previously explained, Plaintiffs have alleged "'concrete and particularized' injuries" that are "actual and imminent" and "'fairly traceable' to Defendants' promulgation of the Rule." *New York*, 408 F. Supp. 3d at 343-44. The Governmental Plaintiffs have alleged—and demonstrated through overwhelming and unrebutted evidence[8]—that the Rule will concretely injure the Governmental Plaintiffs' proprietary, economic, and sovereign interests.

(a) The Rule will cause the Governmental Plaintiffs' residents to disenroll from and forgo public benefits, imposing direct costs and harms on the Governmental Plaintiffs and damaging their economies

As set forth in the Governmental Plaintiffs' complaint, and conceded by DHS, the Rule will cause immigrants and their families—including citizens, and others not subject to public charge determinations—to disenroll from and forgo public benefits programs. *See* Gov't Compl. ¶¶ 180-189, 192; 84 Fed. Reg. at 41,307, 41,463.[9] This chilling effect will cause a myriad of financial and other harms, including to Plaintiffs' hospitals, public health, and economies.

As the Court recognized, the Rule will "decrease enrollment in benefits programs, which will harm Plaintiffs' proprietary interests as operators of hospitals and healthcare systems." *New*

[8] Where, as here, a court is "considering a motion to dismiss for lack of subject matter jurisdiction, such as one for lack of standing, the Court may consider extrinsic evidence proffered by the parties in addition to facts alleged in the pleadings." *Bekker v. Neuberger Berman Grp. LLC*, 2018 WL 4636841, at *3 (S.D.N.Y. Sept. 27, 2018). Accordingly, Plaintiffs incorporate by reference the Declaration of Elena Goldstein, Gov't Dkt. 34, and its exhibits.

[9] *See also, e.g.*, Banks Decl., Gov't Dkt. 34-2, ¶ 7; Barbot Decl.. Gov't Dkt 34-3, ¶¶ 8, 12; David Decl., Gov't Dkt. 34-4, ¶ 19; Gifford Decl., Gov't Dkt. 34-6, ¶¶ 9, 25; Kallick Decl., Gov't Dkt. 34-9, ¶¶ 18-29; Katz Decl., Gov't Dkt. 34-10, ¶¶ 11, 16; Ku Decl., Gov't Dkt. 34-11, ¶¶ 25-33, 46-55; Maksym Decl., Gov't Dkt. 34-8, ¶ 13; Visnauskas Decl., Gov't Dkt. 34-17, ¶¶ 23-24; Zucker Decl., Gov't Dkt. 34-19, ¶¶ 7, 13, 14, 33, 41, 48, 71.

York, 408 F. Supp. 3d at 343. The Governmental Plaintiffs allege that by deterring enrollment in health insurance programs, the Rule will reduce Medicaid revenue, increase uncompensated care, and reverse decades of progress in making healthcare more affordable and accessible. And because individuals without health insurance tend to forgo preventative healthcare, wait longer to seek care, and obtain urgent care from emergency departments, the care they eventually receive is far costlier.[10] *See id.*; Gov't Compl. ¶¶ 194-202, 206. The Governmental Plaintiffs' complaint more than adequately alleges that their healthcare systems, including hospitals that they operate, will shoulder these higher healthcare costs, providing more expensive care without receiving compensation from Medicaid or other healthcare programs.[11] *See* Gov't Compl. ¶¶ 213-19. And the Rule will cause further harm to public health in Plaintiffs' jurisdictions, as disenrollment from public benefits systems jeopardizes the Governmental Plaintiffs' ability to combat the spread of disease and results in public health harms stemming from lack of access to adequate nutrition and housing.[12] *See* Gov't Compl. ¶¶ 194-202, 204-06, 210-11.

Defendants cannot reasonably contend that these allegations lack plausibility. *Brown*, 756 F.3d at 225. Instead, Defendants speculate that the significant costs borne by the Governmental Plaintiffs' healthcare systems will be offset by Plaintiffs spending less to fund Medicaid. But the Governmental Plaintiffs' complaint credibly alleges the contrary (as is borne out by the evidence previously credited by the Court). The Rule will simultaneously *increase* Plaintiffs' healthcare costs as newly uninsured patients avoid preventative care, suffer worse health outcomes, and use

[10] Gifford Decl., Gov't Dkt. 34-6, ¶¶ 30, 34; Maksym Decl., Gov't Dkt., 34-8 ¶ 6; Zucker Decl., Gov't Dkt. 34-19, ¶¶ 17, 34-35, 43.
[11] Ku Decl., Gov't Dkt. 34-11, ¶¶ 63-73 (describing increased costs to state based on loss of Medicaid funding).
[12] Allen Decl., Gov't Dkt. 34-1, ¶¶ 36-37, 43-44; Barbot Decl., Gov't Dkt. 34-3, ¶¶ 14, 18; Gifford Decl., Gov't Dkt. 34-6, ¶¶ 19-20, 27; Katz Decl., Gov't Dkt. 34-10, ¶ 12; Ku Decl., Gov't Dkt. 34-11, ¶¶ 55-63; Maksym Decl., Gov't Dkt. 34-12, ¶ 6; Zucker Decl., Gov't Dkt. 34-19, ¶¶ 39, 44, 52; Mosquera-Bruno Decl., Gov't Dkt. 34-13, ¶¶ 12, 13, 18, 21; Visnauskas Decl., Gov't Dkt. 34-17, ¶¶ 25-32; Williams Decl., Gov't Dk. 34-18, ¶ 16.

more costly services like emergency medical care. *See* Gov't Compl. ¶¶ 213-19.[13] For example, NYC Health + Hospitals expects to face a net financial loss of between $50 to $187 million in the first year of the Rule's implementation.[14] Particularly at this preliminary stage, the Court should not credit Defendants' rank speculation that the Governmental Plaintiffs' healthcare systems, which often treat all patients regardless of their financial resources, *see, e.g.* Gov't Compl. ¶¶ 213, 216, will somehow recoup these substantial losses. To the contrary, Defendants concede that the Rule will shift medical care to emergency rooms, 84 Fed. Reg. at 41,384, and will increase the prevalence of disease, 83 Fed. Reg. 51,270. *See also* DHS, *Regulatory Impact Analysis* 109 (Aug. 2019). Such injuries are "precisely the kind of 'pocketbook'" injuries that confer standing, *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1059 (D.C. Cir. 2018). In fact, the Ninth Circuit has concluded that governmental plaintiffs have standing to challenge the Rule based on these sorts of injuries. *See San Francisco*, 944 F.3d at 786-88.

Moreover, Defendants' unsupported attempts to assess the Governmental Plaintiffs' overall budgets fails to account for Plaintiffs' well-pled allegations—and the uncontroverted supporting evidence[15]—that the Rule will harm the Governmental Plaintiffs' economies through $3.6 billion in economic ripple effects, thousands of lost jobs, and $175 million in lost tax revenue. *See* Gov't Compl. ¶¶ 228-31. Nor do Defendants acknowledge the cost to the Governmental Plaintiffs of shifting the costs of food and shelter benefits from the federal

[13] *See, e.g.*, Guinn Decl., Gov't Dkt. 34-8, ¶¶ 5-7, 10; Maksym Decl., Gov't Dkt. 34-12, ¶¶ 14, 22; Mosquera-Bruno Decl., Gov't Dkt. 34-13, ¶ 4; Zucker Decl., Gov't Dkt. 34-19, ¶ 3.
[14] Katz Decl., Gov't Dkt. 34-10, ¶ 19; *see also* Zucker Decl., Gov't Dkt. 34-19, ¶ 18 (noting that New York State already has inadequate funds to compensate for services provided to patients who cannot pay for the cost of their care and explaining that the Rule will exacerbate this problem).
[15] Kallick Decl., Gov't Dkt. 34-9, ¶¶ 42-56 (quantifying lost GDP, jobs, and tax revenue). If disenrollment reaches 35 percent, Plaintiff States collectively stand to lose $2.7 billion in federal funding, $5.5 billion in ripple effects, and tens of thousands of jobs. *See id.*; *see also* Schanzenbach Decl., Gov't Dkt. 34-16, ¶¶ 9, 41-43 (SNAP only); Gifford Decl., Gov't Dkt. 34-6, ¶ 12.

government to Plaintiffs.[16] *See* Gov't Compl. ¶¶ 220-21.

In any event, Plaintiffs need not show that they will suffer a net drain on their overall budgets. The possibility of countervailing benefits from a challenged action "does not negate standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006). And DHS concedes that state and local governments will be economically harmed. 84 Fed. Reg. at 41,301, 41,473.

These injuries are the predictable result of the Rule and are fairly traceable to Defendants' conduct. *See U.S. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (the "predictable effect of Government action on the decisions of third parties" can support standing, regardless of whether third parties' decisions are lawful or even rational); *New York*, 408 F. Supp. 3d at 344 (holding that Plaintiffs' injuries are "fairly traceable" to the Rule). Indeed, Defendants *acknowledge* the chilling effects of the Rule, 84 Fed. Reg. at 41,307; *id.* at 41,463, and the resulting "adverse health effects," "increase in medical expenses," and "lost productivity," *id.* at 41,489.

(b) The Rule will cause the Governmental Plaintiffs to expend significant resources to adjust their state and local run public benefits programs and combat confusion surrounding the Rule

Even apart from the disenrollment and chilling effects detailed above, the Governmental Plaintiffs credibly allege that the Rule will force the Governmental Plaintiffs to expend millions of dollars on altering their public benefit programs, such as being forced to overhaul enrollment and record-keeping systems. Gov't Compl. ¶¶ 239-250.[17]

These changes are not incidental or self-inflicted, as Defendants contend. To the contrary, the Rule recognizes that it will impose such operational costs on benefit-program administrators.

[16] Mosquera-Bruno Decl., Gov't Dkt. 34-13, ¶¶ 21-22; Visnauskas Decl., Gov't Dkt. 34-17, ¶ 34.
[17] Banks Decl., Gov't Dkt. 34-2, ¶¶ 24-28; Gifford Decl., Gov't Dkt. 34-6, ¶¶ 43, 46-47; Maksym Decl., Gov't Dkt. 34-12, ¶ 13; Zucker Decl., Gov't Dkt. 34-19, ¶¶ 56-60, 64-70.

84 Fed. Reg. at 41,457, 41,469-70. And these direct and significant burdens will not necessarily arise each time any change in federal policy affects Plaintiffs' residents. *See* Gov't Mot. 7-8. The burdens here are not limited to reading the Rule and answering questions, but rather extend to redesigning complex enrollment, recordkeeping, and informational systems—burdens not imposed by every change to federal policy.

In any event, the Governmental Plaintiffs also amply allege concrete injury from having to implement costly training and outreach efforts to combat fear and misinformation about the Rule—problems that indisputably fuel the Rule's disenrollment effects and harms. *See* Gov't Compl. ¶¶ 243-47, 250; 64 Fed. Reg. at 28,692 (past confusion regarding benefits resulted in widespread avoidance of benefits).[18] Plaintiffs' reasonable steps to "mitigate" such "substantial risk" of harm further support standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013); *see also Mayor & City Council of Baltimore v. Trump*, 2019 WL 4598011, at *18 (D. Md. Sept. 20, 2019) (city's "education and outreach" costs concerning public charge changes sufficient for standing).

2. The Organizational Plaintiffs Have Standing

An organization has standing when it is forced "to divert money from its other current activities to advance its established organizational interests." *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). "[O]nly a perceptible impairment of an organization's activities is necessary for there to be injury-in-fact." *Nnebe v. Daus*, 644 F.3d 147,

[18] Banks Decl., Gov't Dkt. 34-2, ¶¶ 25-28; Gifford Decl., Gov't Dkt. 34-6, ¶¶ 39, 41; Gonzalez-Murphy Decl., Gov't Dkt. 34-7, ¶¶ 17-21, 23-27; Guinn Decl., Gov't Dkt. 34-8, ¶ 37. *See, e.g.*, Katz Decl., Gov't Dkt. 34-10, ¶¶ 20, 25-26; Mosquera-Bruno Decl., Gov't Dkt. 34-13, ¶¶ 23- 24; Mostofi Decl., Gov't Dkt. 34-14, ¶¶ 16-21; Zucker Decl., Gov't Dkt. 34-19, ¶¶ 61-62.

157 (2d Cir. 2011) (quotation marks and citation omitted). In *Nnebe*, for example, a taxi drivers' advocacy group had standing to assert due process claims challenging the defendants' policies for suspending taxi licenses where those policies required the organization to "expend[] resources to assist its members . . . by providing initial counseling, explaining the suspension rules to drivers, and assisting the drivers in obtaining attorneys." *Id.* "[S]omewhat relaxed standing rules apply" in cases like this, where "a party seeks review of a prohibition prior to its being enforced." *Oyster Bay*, 868 F.3d at 110. Where "multiple parties seek the same relief, the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Id.* at 109 (quotation marks and citation omitted).

This Court correctly determined that the Organizational Plaintiffs easily satisfy this standard because "the Rule forces them to devote substantial resources to mitigate its potentially harmful effects—resources that plaintiffs could and would have used for other purposes." *MRNY*, 2019 WL 5484638, at *4. For example, Plaintiff MRNY's staff has had to devote substantial time addressing members' public charge fears by, among other things, holding emergency meetings and conducting dozens of informational workshops, at the expense of their ability to engage in other work central to its mission, such as policy advocacy. MRNY Compl. ¶¶ 25, 262.[19] Organizational Plaintiffs that provide direct legal services must spend additional time and resources on applications for adjustment of status and related proceedings, with correspondingly less time and resources available to represent clients in other immigration matters, including removal proceedings. MRNY Compl. ¶¶ 25, 30, 38, 46.[20] Plaintiff ASC has seen increased

[19] *See also* Oshiro Decl., MRNY Dkt. 43, ¶¶ 21, 25, 40. Because Defendants challenge the Organizational Plaintiffs' standing, the Court may consider extrinsic evidence proffered by the parties, such as declarations and exhibits. *See supra* n.8. The Organizational Plaintiffs incorporate by reference the declarations submitted in support of their motion for preliminary injunction.

[20] *See also* Oshiro Decl., MRNY Dkt. 43, ¶¶ 27, 35, 41; 44, Russell Decl., MRNY Dkt. 44, ¶¶ 22-24; Nichols Decl.,

demand for its food pantries and ESL classes—and been forced to turn noncitizen clients away—as its clients forgo public benefits and services.[21] These harms affect more than the Organizational Plaintiffs' "abstract social interests." MRNY Mot. 6. They hinder the Organizational Plaintiffs' ability to deliver critical services to the immigrants they are mission-bound to serve and threaten the viability of Plaintiffs' programs. *See* MRNY Compl. ¶¶ 25, 28-30, 33, 38-40, 44-46, 260-70.

Defendants' reliance on this Court's decision in *Citizens for Responsibility & Ethics in Washington v. Trump* ("*CREW*") is misplaced. 276 F. Supp. 3d 174 (S.D.N.Y. 2017), *vacated and remanded*, 939 F.3d 131 (2d Cir. 2019) (cited in MRNY Mot. 6-7). The organizational plaintiff in *CREW* lacked standing because it failed to allege that defendants' actions impeded its performance of mission-related activities, or that it used resources to remedy the consequences of Defendants' conduct. 276 F. Supp. 3d at 190. The Organizational Plaintiffs here, by contrast, allege that Defendants' actions require them to "expend resources they would not have otherwise spent to avert or remedy some harm," *id.* at 190—harm that, according to the Court, Plaintiffs sufficiently allege they "have *already* begun to suffer." *MRNY*, 2019 WL 5484638, at *5.[22]

Defendants also argue that the Organizational Plaintiffs have not established standing for their Fifth Amendment claim because Plaintiffs "appear to" have asserted the claim on behalf of their members. MRNY Mot. 7. But "nothing prevents an organization from bringing a [civil

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MRNY Dkt. 46, ¶¶ 21-26; Wheeler Decl., MRNY Dkt. 48, ¶¶ 10-16. In some cases, the loss of time caused by the Rule also leads to decreased revenue. Nichols Decl., MRNY Dkt. 46, ¶¶ 25-26.

[21] Nichols Decl., MRNY Dkt. 46, ¶¶ 18-19.

[22] Defendants' assertion that an organizational plaintiff must "show that it was compelled to direct resources towards activities it would not have performed 'in the ordinary course'" MRNY Mot. 6, is contrary to the law of this Circuit. The organizational plaintiff in *Nnebe* had standing because it devoted resources to assisting members in defending against legal claims, although doing so was part of its ordinary activities. 644 F.3d at 157-58. In any event, the harms described are not how the Organizational Plaintiffs spend their resources "in the ordinary course." They are a substantial diversion from Plaintiffs' ordinary-course activities necessary to protect Plaintiffs' clients and constituents from harm due to the Defendants' unlawful actions.

rights] suit on its own behalf so long as it can independently satisfy the requirements of Article III standing." *Nnebe*, 644 F.3d at 156 (citation omitted). For the reasons explained above, the Organizational Plaintiffs easily satisfy Article III standing requirements here.

B. Plaintiffs' Claims Remain Ripe for Judicial Review

"One can conceive of no issue of greater ripeness than that presented here." *New York*, 408 F. Supp. 3d at 344; *MRNY*, 2019 WL 5484638, at *5. Plaintiffs' claims concern legal questions that are ripe for review, both constitutionally and prudentially. *See Nat'l Org. for Marriage. v. Walsh*, 714 F.3d 682, 691 (2d Cir. 2013) (prudential ripeness did not apply where future contingencies were not determinative of the legal questions before the court); *Baltimore*, 2019 WL 4598011, at *21 (holding changes to parallel State Department public charge framework were ripe). As the Court previously noted, "[n]o further factual predicate is necessary for purposes of determining ripeness, where there is clearly a legal question about whether the Rule" violates the APA. *New York*, 408 F. Supp. 3d at 344; *MRNY*, 2019 WL 5484638, at *5. And Defendants' argument that Plaintiffs' claims are not ripe because their allegations "are all premised on hypothesizing about the potential future applications of the Rule to individuals," Gov't Mot. 9; MRNY Mot. 8, misses the point that "'facial' challenges to regulation[s] are generally ripe the moment the challenged regulation . . . is passed." *Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona*, 915 F. Supp. 2d 574, 595 (S.D.N.Y. 2013) (quoting *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997)). The harms to Plaintiffs here do not turn on whether any specific public-charge determination violates the INA. *See Ross v. Bank of Am.*, 524 F.3d 217, 226 (2d Cir. 2008). Indeed, this Court previously determined that the Organizational Plaintiffs "sufficiently allege 'concrete and particularized' injuries that they themselves . . . have *already* begun to suffer," apart from the Rule's impact on individuals. *MRNY*, 2019 WL 5484638, at *5; MRNY Compl. ¶¶ 25, 28-30, 33, 38-40, 44-46,

260-70; *see also* Gov't Compl. ¶¶ 183-86, 246-247; *Walsh*, 714 F.3d at 691. That harm has only increased now that the Rule has gone into effect.

C. Plaintiffs Are Within the Zone-of-Interests

This Court has previously held that Plaintiffs fall squarely within the APA's "zone of interests." Defendants' stale arguments cannot be countenanced, particularly at the *less* rigorous motion to dismiss stage.

1. The Governmental Plaintiffs are Within the Zone-of-Interests

"Plaintiffs plainly fall within the INA's zone of interest." *New York*, 408 F. Supp. 3d at 345. Given the APA's "generous review provisions," the zone-of-interests test is satisfied unless Plaintiffs' interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 & n.16 (1987).

The Governmental Plaintiffs easily satisfy this lenient standard here. Congress enacted the public-charge provision in part to protect state and city fiscs. *See* 8 U.S.C. §§ 1183a(a), (b), (e)(2); *see also id.* § 1183. But Congress also maintained a narrow meaning of "public charge" to ensure that States and their subdivisions continue to receive the economic and other benefits that flow from employable immigrants becoming "a valuable component part of the body-politic." 13 Cong. Rec. 5108 (statement of Rep. Van Voorhis). The zone-of-interests test is satisfied because the Rule recognizes that it will affect these interests.[23] *See CREW*, 939 F.3d at 158.

The fundamental purpose of the public-charge provision has never been, as Defendants contend, to eliminate lawful permanent residents' use of *any* public benefits. *See infra* Section II.A.4. But in any event, the Governmental Plaintiffs are the administrators of the public-benefit

[23] The Ninth Circuit has assumed, without deciding, that governmental plaintiffs are within the zone of interests to challenge the Rule. *See San Francisco*, 944 F.3d at 786 n.8.

programs that Defendants assert are at issue. The Governmental Plaintiffs' interests are thus within the zone of interests for this reason as well. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225-26 (2012). *See also Baltimore*, 2019 WL 4598011, at *24-25; *Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015) (states' role in administering public benefits put states within INA's zone of interests).

2. The Organizational Plaintiffs Are Within the Zone-of-Interests

This Court also correctly concluded that the Organizational Plaintiffs "plainly fall within the INA's zone of interests." *Make the Road*, 2019 WL 5484638, at *6. The Second Circuit recently explained that the zone of interests inquiry "does not require the plaintiff to be an intended beneficiary of the law in question." *CREW*, 939 F.3d at 158. In *Bank of America v. City of Miami*, for example, the Supreme Court held that the city's discriminatory lending claims were within the zone of interests of the Fair Housing Act despite any indication that the Act was intended to protect municipal budgets. 137 S. Ct. 1296, 1303-04 (2017). The Supreme Court has also instructed that, in assessing Congress's intent, the court must consider not merely the specific provision at issue, but its "overall context" and "Congress' overall purposes in" enacting the statute. *Clarke*, 479 U.S. at 401 (1987).

The Organizational Plaintiffs readily satisfy that standard. Contrary to Defendants' assertion that only individual noncitizens fall within the zone of interests here, MRNY Mot. 10, immigrant advocacy organizations—including plaintiff MRNY itself—have been afforded standing to challenge immigration regulations in light of INA provisions that "give [such organizations] a role in helping immigrants navigate the immigration process." *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1245 (9th Cir. 2018) (collecting statutory provisions).[24] The

[24] *See, e.g.*, *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d. 260, 269 n.3 (E.D.N.Y. 2018) (challenge to termination of

Organizational Plaintiffs' economic injuries also make them "reliable private attorney[s] general to litigate the issues of the public interest." *CREW*, 939 F.3d at 155.[25]

Defendants' contention that the Organizational Plaintiffs' only interest is "more widespread use of taxpayer-funded benefits by aliens," MRNY Mot. 11, reflects a fundamental misunderstanding of Plaintiffs' roles in advising, assisting, and advocating for immigrants.[26] Defendants also ignore the "overall purpose[s]" of the INA. *See Clarke*, 479 U.S. at 401-02; *E. Bay Sanctuary Covenant*, 909 F.3d at 1244-45 & n.9 (in considering whether organizational plaintiffs were within the zone of interests of the asylum provision of the INA, the court should consider "any provision that helps us to understand Congress' overall purposes in the INA") (quotation marks and citation omitted). As DHS concedes, the INA's purposes include promoting "family unity, diversity, and humanitarian assistance." 84 Fed. Reg. at 41,306. These are all core components of the Organizational Plaintiffs' missions. In any event, the Organizational Plaintiffs' role in advising noncitizens about the use of public benefits puts them within the zone of interests of the statute. *See Patchak*, 567 U.S. at 225.

Defendants similarly argue that only individual noncitizens fall within the zone of interests of the Organization Plaintiffs' equal protection claim. MRNY Mot. 10-11. But the Organizational Plaintiffs' economic injury places them squarely within the zone of interests of

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DACA program); *Al Otro Lado, Inc. v. Neilsen*, 327 F. Supp. 3d 1284, 1299-1302 (S.D. Cal. 2018) (challenge to DHS asylum policy); *Doe v. Trump*, 288 F. Supp. 3d 1045, 1067-68 (W.D. Wash. 2017) (challenge to agency refugee policy).

[25] Defendants rely on *INS v. Legalization Assistance Project*, 510 U.S. 1301 (1993) (O'Connor, J., in chambers), but that 27-year old decision—which was issued by a single Justice interpreting a different statute—is inconsistent with the modern zone of interests doctrine set forth in *City of Miami* and *Clarke*. Defendants also rely on *Fed'n for Am. Imm'gn Reform, Inc. v. Reno*, but that case simply held that an anti-immigration group lacked standing to challenge an immigration decision based on its objections to immigration generally. 93 F.3d 897, 900-04 (D.C. Cir. 1996).

[26] *See, e.g.*, MRNY Dkt. 43, Oshiro Decl. ¶¶ 5, 36 (Plaintiff Make the Road New York's mission is to "build[] the power of immigrant and working-class communities to achieve dignity and justice through organizing, policy innovation, transformative education, and survival services"); MRNY Dkt. 44, Russell Decl. ¶¶ 4, 42; MRNY Dkt. 46, Nichols Decl. ¶¶ 4, 7-8, 10, 12, 15, 18, 20, 24, 26; MRNY Dkt. 48, Wheeler Decl. ¶¶ 10, 14, 16, 18; MRNY Dkt. 47, Yoo Decl. ¶¶ 21-25.

the Fifth Amendment. *See CREW*, 939 F.3d at 157 n.13 (rejecting argument that the zone of interests test is more strictly applied to constitutional claims than APA claims); *cf. Nnebe*, 644 F.3d at 156 (finding that advocacy organization had standing to assert Due Process claim based on alleged economic injury sustained by virtue of diverted resources).

II. Plaintiffs Have Plausibly Alleged that the Rule Violates the APA

A. Plaintiffs Have Stated a Claim that Rule is Contrary to the INA

1. The Rule is Not Entitled to *Chevron* Deference

Defendants urge the Court to dismiss Plaintiffs' APA claims on the grounds that the Rule is a "within the bounds of the [INA]" and therefore permissible under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). MRNY Mot. 12; Gov't Mot. 12. But *Chevron* does not apply to regulations like the Rule that involve questions "of deep 'economic and political significance,'" such as those that involve "billions of dollars in spending" and affect healthcare "for millions of people." *King v. Burwell*, 135 S. Ct. 2480 2489 (2015); *see also Texas*, 809 F.3d at 181-82 (DHS regulation concerning non-enforcement policy for immigrant parents of citizen and lawful permanent resident children not afforded *Chevron* deference because it "implicates 'questions of deep economic and political significance'"), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). The Rule—which, among other things, affects billions of dollars of spending on public benefits programs for millions of people—qualifies as such a "major question" to which *Chevron* deference does not apply.

In any event, the Rule still fails at both *Chevron* steps. At *Chevron* step one, "a reviewing 'court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000) (quoting *Chevron*, 467 U.S. at 842-43). Congress's intent is determined by looking at, among other things, the "range of plausible meanings" that the statutory language could have had when the statute

was enacted; its legislative history, including rejected efforts to amend the statute to the way the agency now interprets it; and congressional reenactment of the statute in the face of prior agency interpretation. *Id*. at 143-56. *Accord Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 316-24 (2014) (rejecting agency reading of statute in light of prior inconsistent agency interpretation, as well as statute's structure and design). Here, the meaning of the term "public charge" at the time it was enacted, the history of consistent agency interpretation, and the legislative history of the INA all demonstrate that the Rule is inconsistent with Congress's intent.

If Congress's intent is ambiguous, then at *Chevron* step two courts will look to dictionary definitions and "contextual indications" of the term's meaning, and will reject an agency's interpretation "when it goes beyond the meaning the statute can bear." *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 226, 229 (1994). "[T]he presence of some uncertainty does not expand Chevron deference to cover virtually any interpretation of the [statute]. . . We can discern the outer limits of the term . . . even through the clouded lens of history." *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 525 (2009). Here, all interpretive tools indicate that the Rule is outside permissible bounds. *See Mich. v. EPA*, 135 S. Ct. 2699, 2707-08 (2015).

Defendants argue that the "expansive delegation of authority by Congress grants DHS wide latitude to interpret 'public charge.'" MRNY Mot. 25; Gov't Mot. 25; *see generally* MRNY Mot. 24-27; Gov't Mot. 24-27. But while the INA undoubtedly gives the Executive authority to determine whether an individual noncitizen is likely to be a public charge based on the totality of the circumstances, the statute does not give it unfettered discretion to redefine the statutory term "public charge" in a way that is inconsistent with the plain meaning of the statute and decades of administrative and judicial interpretation and congressional intent. As this Court concluded, "[n]otwithstanding this implicit delegation" from Congress to "fill in the statutory gaps,"

"agencies must operate within the bounds of reasonable interpretation, and reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole." *New York*, 408 F. Supp. 3d at 346 (internal quotation marks omitted); *MRNY*, 2019 WL 5484638, at *6 (quoting *Brown & Williamson*, 529 U.S. at 159; *Util. Air Regulatory Grp.*, 537 U.S. at 321(alterations omitted)).

2. The Rule is Contrary to the Consistent Historical Interpretation of "Public Charge" that Congress Has Repeatedly Approved

Plaintiffs have adequately pled that the Rule is contrary to the INA. Gov't Compl. ¶¶ 117-32; MRNY Compl. ¶¶ 55-71. Plaintiffs allege that DHS's new definition conflicts with the established interpretation of public charge that Congress incorporated into the INA, as demonstrated by the plain language of the public charge inadmissibility provision, its longstanding and consistent historical interpretation, and Congress's repeated approval of that interpretation and rejection of efforts to redefine it. As this Court correctly concluded, Defendants "d[o] not dispute" that their "new definition" of "public charge"—receiving 12 months of benefits within a 36-month period—has "*never* been referenced in the history of U.S. immigration law [and] there is *zero* precedent supporting [their] particular definition." *New York*, 408 F. Supp. 3d at 347; *MRNY*, 2019 WL 5484638, at *7. The Rule "changes the public charge assessment into a *benefits* issue, rather than an inquiry about *self-subsistence*," but "[r]eceipt of a benefit . . . does not necessarily indicate that the individual is unable to support herself." *New York*, 408 F. Supp. 3d at 348; *MRNY*, 2019 WL 5484638, at *8. Because "[n]o ordinary or legal dictionary definition of 'public charge' references Defendants' proposed meaning of the term," the Court should once again conclude that "Defendants lack the authority to redefine 'public charge' as they have." *New York*, 408 F. Supp. 3d at 347; *MRNY*, 2019 WL 5484638, at *7.

First, Plaintiffs have sufficiently alleged that the Rule is inconsistent with the plain

language of the INA. As discussed above, at the time it was introduced in federal immigration law, the term "public charge" referred to a narrow category of persons who are institutionalized or otherwise completely dependent on public assistance—as shown in the 1882 Immigration Act itself and its legislative history as well as the state laws on which the statute was modeled. *See Richards v. Ashcroft*, 400 F.3d 125, 128 (2d Cir. 2005) ("[W]hen a federal statute uses, but does not define, a term of art that carries an established common law meaning, [courts] will give that term its common law definition"). This interpretation was confirmed in case law from the early twentieth century. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363-64 (2019) (courts look to "common usage," such as "dictionary definitions" and "early case law," to "shed light on [a] statute's ordinary meaning").

Second, the consistent, century-long judicial and administrative interpretation of "public charge" as one unable to care for oneself and therefore primarily dependent on the government for subsistence is powerful evidence of the meaning of that term. "[A] long-standing, contemporaneous construction of a statute by the administering agencies is entitled to great weight, and will be shown great deference." *Leary v. United States*, 395 U.S. 6, 25 (1969) (quotation marks, citations, and alteration omitted); *see also United Airlines, Inc. v. Brien*, 588 F.3d 158, 172 (2d Cir. 2009).

Third, the adoption of the Field Guidance only three years after enactment of PRWORA and IIRIRA further supports this interpretation. As the Supreme Court has held, an implementing agency's interpretation of a statute soon after its enactment is better evidence of the statute's meaning and Congress's intent than a later, inconsistent interpretation. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167-68 (2001) (looking to agency's "original interpretation" of the Clean Water Act, "promulgated two years after its enactment," as

well as the absence of any "persuasive evidence that the [agency] mistook Congress' intent," to determine that a later inconsistent interpretation was against congressional intent); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993). Here, Defendants cite no "persuasive evidence that [INS] mistook" Congress's intent. *Solid Waste Agency*, 531 U.S. at 168.

Fourth, Congress's repeated reenactment of the public charge provision without relevant change evidences its approval of the agency interpretation. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC v. Schor*, 478 U.S. 833, 846 (1986); *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633-34 (2019) ("[W]e presume that when Congress reenacted the same language . . . , it adopted the earlier judicial construction of the phrase."); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . .").

Fifth, congressional intent to preserve an agency's interpretation of a statute is especially clear where, as here, Congress has rejected legislation specifically intended to overturn that interpretation. In *Bob Jones University v. United States*, the Court considered the IRS's decade-old determination that private schools practicing racial discrimination were not entitled to tax-exempt status. 461 U.S. 574, 579 (1983). In upholding the agency's interpretation of the relevant provision of the tax code, the Court found that Congress's repeated consideration and rejection of bills intended to overturn the IRS's interpretation was "significant" evidence of "Congressional approval of the [IRS] policy." *Id.* at 600-01. Similarly, the Second Circuit recently explained that the "rejection of [a] provision" and ultimate "omission of pertinent

language from a [draft] bill being considered by Congress" is "strong evidence of a deliberate decision by Congress" and is "probative of [congressional] intent." *Trump v. Deutsche Bank AG*, 943 F.3d 627, 642-43 (2d Cir. 2019); *see also Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 801-02 (2014) (Congressional intent to approve longstanding judicial interpretation of scope of tribal immunity clear when Congress considered, but did not enact, two bills that expressly sought to abrogate that interpretation). The Supreme Court has placed particular weight on Congress's decision to enact a bill without specific language overturning existing law that passed one chamber of Congress but was removed during conference, just as Congress did in 1996 when it rejected a proposal to redefine "public charge." *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 408, 414 n.8 (1975) ("Congress plainly ratified" prior judicial interpretation when conference committee "specifically rejected" language overturning that interpretation, and the bill passed both chambers without such language).

3. The Rule Expands Public Charge Far Beyond the Bounds of the Term's Historical Meaning and Reasonable Interpretation

Plaintiffs have also alleged the Rule's interpretation of "public charge" is far outside the well-established bounds of the term. Gov't Compl. ¶¶ 117-25; MRNY Compl. ¶¶ 97-115. First, as Congress and the expert federal benefit-granting agencies have made clear, the supplemental benefits targeted by the Rule do not serve only the truly destitute who might plausibly be considered "public charges" under that term's historically established meaning. Rather, Congress made these programs available to many employed individuals who have "incomes far above the poverty level" to further its "broad public policy decisions" about improving public health, nutrition, and economic opportunities for middle- and low-income individuals. 64 Fed. Reg. at

28,692; Gov't Compl. ¶ 56.[27] Plaintiffs allege that the supplemental benefits newly targeted by the Rule are not limited to individuals who are unable to work and dependent on the public for their subsistence. Gov't Compl. ¶¶ 66-102; MRNY Compl. ¶¶ 116-30.

And the Rule's categorical treatment of supplemental benefits takes it even further afield from the historical understanding of "public charge." *See* Gov't Compl. ¶¶ 120-21. As the Court found, "if a DHS officer believes that an individual is likely" to use *any* amount of these supplemental benefits for 12 out of 36 months during her entire life, "the inquiry ends there, and the individual is *automatically* considered a public charge[]"—even if there is no plausible basis to infer that acceptance of such benefits indicates long-term dependence on the government for subsistence. *New York*, 408 F. Supp. 3d at 349; *MRNY*, 2019 WL 5484638, at *9.

Finally, the Rule's 12/36 threshold and aggregate counting mean that noncitizens will be considered "public charges" based on the likelihood of using multiple benefits *temporarily*—for just a few months—to address an acute period of financial strain or emergency. *See* Gov't Compl. ¶¶ 118-21, 125; MRNY Compl. ¶¶ 101-02, 198. But short-term use of any amount of supplemental benefits, particularly by employed individuals, bears no resemblance to the types of long-term uses of almshouses, institutional care, or income maintenance that have traditionally been the sole bases for finding an applicant to be a public charge. The Rule thus stretches the historical understanding of "public charge" far beyond "the bounds of reasonable interpretation." *Utility Air Reg. Grp.*, 573 U.S. at 321.

4. Congressional Enactments Do Not Justify Overriding Congress's Decision not to Redefine "Public Charge"

Defendants ask this Court to infer, based on statutory provisions other than the public

[27] *See, e.g.*, 7 U.S.C. § 2011 (SNAP "safeguard[s] the health and well-being of the Nation's population by raising levels of nutrition among low-income households."); 42 U.S.C. § 5301(b) (Nation's welfare depends on government action to "improve the living environment of low- and moderate-income families").

charge provision, that Congress intended to expand the definition of public charge in 1996—despite its express consideration and rejection of such legislation. None of the cited provisions support Defendants' argument.

First, Defendants' reliance on statements of policy in PRWORA 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), is misplaced. Gov't Mot. 1-2, 17; MRNY Mot. 1-2, 17. In passing PRWORA, Congress limited immigrants' use of specific benefits in particular ways, such as by imposing a waiting period for qualified immigrants to access certain benefits and denying benefits altogether to undocumented immigrants. *See* 8 U.S.C § 1613. At the same time, Congress chose to allow some immigrants access to certain benefits, reflecting its conclusion that—after the requisite waiting period—use of those benefits was consistent with congressional policy that immigrants be "self-sufficient." *See* 8 U.S.C. § 1601. That the Rule treats receipt of these very same benefits as a sign of a *lack* of self-sufficiency thus conflicts with Congress's contrary judgment in the Act.

PRWORA's statements of legislative purpose do not justify the Rule's radical expansion of public charge for another reason. The Supreme Court has stressed that balancing multiple legislative purposes "is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law[,]" because "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). As Chief Justice Burger explained:

> Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Bd. of Governors of Fed. Res. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986). The INA reflects a balance of many congressional goals, including "family unity, diversity, [and] humanitarian assistance." 84 Fed. Reg. at 41,306; *see also* MRNY Compl. ¶ 10. Defendants' assertion that Congress's identification of a single policy justifies overturning the longstanding meaning of a statutory provision ignores the teaching of *Rodriguez* and *Board of Governors*.

Second, Defendants point to provisions in the INA that require certain noncitizens to provide enforceable affidavits of support by their sponsors as a condition of admissibility under the public charge provision. *See* Gov't Mot. 14-15; MRNY Mot. 14-15. Affidavits of support had long existed in immigration law, but PRWORA required that they be enforceable against the sponsor, and IIRIRA made obtaining an enforceable affidavit an independent requirement for some categories of immigrants under the public charge inadmissibility provision. *See* Gov't Compl. ¶¶ 40, 158; MRNY Compl. ¶¶ 76, 78. As discussed above, however, Congress chose not to redefine "public charge" to mean any receipt of cash or noncash benefits and rejected such a proposal a month later when enacting IIRIRA. Had Congress intended to redefine public charge, it would have done so directly. *See generally Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes"). The D.C. Circuit recently reached a similar conclusion in *Gresham v. Azar*, 2020 WL 741278, at *6 (D.C. Cir. Feb. 14, 2020), when it concluded that Congress's decision not to "amend Medicaid to add a work requirement for all recipients—at a time when the other two major welfare programs had those requirements and Congress was in the process of amending welfare statutes—demonstrates that Congress did not intend to incorporate work requirements into Medicaid."

Contrary to Defendants' contention, there is no inconsistency between requiring

noncitizens seeking admission or status adjustment to provide an enforceable affidavit of support and retaining the traditional, narrow interpretation of "public charge." Gov't Mot. 14-15, MRNY Mot. 14-15. For one, affidavits of support apply in more narrow circumstances than the Rule. Affidavits are almost always required only where applicants seek family-based visas, not employment-based visas, but the Rule applies to both categories of applicants. And the affidavits' contractual obligation is enforceable only after an immigrant has been admitted, and it encompasses only covered benefits received during defined time periods. 8 U.S.C. §§ 1182(a)(4)(C)-(D), 1183a(2)-(3). By contrast, the Rule's new definition of "public charge" would apply to all applicants, would be applied before their admission, and would consider any benefits they might receive during their life—including during time periods well beyond the period when affidavits of support are enforceable.

As the Rule acknowledges, affidavits of support are more appropriately considered a "separate requirement" for certain immigrants' applications for adjustments of status, 84 Fed. Reg. at 41,448, not a requirement that fundamentally alters the threshold public-charge analysis. Although certain immigrants must file an affidavit of support with their application to avoid a public-charge finding, such affidavits become relevant only after an immigrant has been admitted. Affidavits of support thus serve a purpose distinct from the threshold admissibility review: "to provide a reimbursement mechanism" for the government after the applicant's admission "to recover from the sponsor" who broke a contract to support the permanent resident. *See* 84 Fed. Reg. at 41,320. This limited post-admission remedy does not remotely suggest that Congress sought to transform the threshold meaning of "public charge."

The requirement of an affidavit of support—which DHS acknowledges is a requirement in relevant cases "separate" from a public charge assessment, 84 Fed. Reg. at 41,448—protects

the public fisc by ensuring that the sponsor's agreement to repay certain benefits used by the noncitizen can be enforced. It also furthers the congressional policy of discouraging immigrants from relying on public benefits. And it does so without undermining the compelling goals of family unity and diversity, which would be thwarted by redefining "public charge" to render large numbers of noncitizens ineligible for lawful permanent residence.

Third, Defendants rely on a provision of the INA that directs immigration officers adjudicating public charge inadmissibility determinations for immigrants who have been "battered or subjected to extreme cruelty" in the United States not to "consider *any benefits* the alien may have received" under section 8 U.S.C. § 1641(c)(1)(A). Gov't Mot. 13-14; MRNY Mot. 13-14 (citing 8 U.S.C. §§ 1182(s), 1611-13, 1641(c)) (emphasis added). In exempting so-called "battered qualified aliens" from public charge, 8 U.S.C. § 1182(a)(4)(E), Congress did not implicitly "presuppose[]" that any benefits use by any other noncitizens would necessarily cause the latter to all be categorically deemed public charges. *See* Gov't Mot. 13; MRNY Mot. 14. Indeed, Section 1182(s) was enacted in 2000, when the Field Guidance was already in place, and Defendants point to no evidence that Congress, in enacting that provision, intended to overrule the Field Guidance and radically reinterpret "public charge" *sub silentio*.

B. Plaintiffs Have Stated a Claim that DHS Lacks Statutory Authority to Promulgate the Rule

The Organizational Plaintiffs have plausibly stated a claim that the Rule violates the APA because DHS lacks authority to promulgate it. *See* MRNY Compl. ¶¶ 179-83. In both the NPRM and the Rule, DHS identifies Sections 103 and 212(a)(4) of the INA as a source of its authority to issue the Rule. 83 Fed. Reg. at 51,124; 84 Fed. Reg. at 41,295-96. But Section 103 excludes from the powers of the Secretary of Homeland Security (the "Secretary") the administration or enforcement of laws that "relate to the power, functions, and duties conferred upon the . . .

Attorney General." 8 U.S.C. § 1103(a)(1); *see also id.* § 1103(a)(3) (empowering the Secretary to establish regulations necessary for "carrying out his authority"). Section 212(a)(4), also invoked by DHS, confers authority for making public charge determinations on the Attorney General, not DHS. It provides that a noncitizen who "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); *see also* MRNY Compl. ¶¶ 182-83.

Defendants now argue that the Homeland Security Act of 2002 (the "HSA") transferred public charge rulemaking authority from the Attorney General to the Secretary. MRNY Mot. 41. In doing so, they rely on several statutory provisions that were not cited anywhere in the NPRM or the Rule. *Id.* 41-42 (relying on 6 U.S.C. § 112; 6 U.S.C. § 202; 6 U.S.C. § 557; 6 U.S.C. § 451; 6 U.S.C. § 271; 6 U.S.C. § 251). As a threshold point, this Court should "refuse to consider" these provisions because the agency "did not mention [them] in its notice of proposed rulemaking, because no interested party was ever afforded an opportunity to comment on the [agency's] authority under [them], and because the [agency's] final decision does not cite [them]." *Glob. Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1297-99 (5th Cir. 1983); *see also* 5 U.S.C. § 553(b)(2), (c); *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 833 (5th Cir. 2010).

In any event, although the HSA transferred certain INS "functions" to DHS, MRNY Mot. 41, Congress clearly did not intend the same provisions to automatically transfer *rulemaking* authority. For example, although the HSA transferred adjudicatory authority over "immigrant visa petitions" to USCIS, MRNY Mot. 42, Congress separately transferred authority for "establishing and administering rules . . . governing the granting of visas." *See* 6 U.S.C. §§ 202(4), 236(b). Similarly, although the HSA transferred to USCIS adjudicatory authority over "asylum and refugee applications," 6 U.S.C. § 271(b)(3), Congress did not grant the Secretary

rulemaking authority over such applications until 2005. *See* Pub. L. No. 109-13, div. B, title I, § 101(g)(1), 119 Stat. 231, 305 (2005), codified at 8 U.S.C. § 1159(b).

Defendants' argument that references to "Attorney General" in the INA now refer to the "Secretary—either exclusively or concurrently with the Attorney General," MRNY Mot. 42, is belied by court decisions and subsequent acts of Congress. For example, the Third Circuit Court of Appeals in *Sarango v. Attorney General of the United States* held that a 2006 statute that replaced the term "Attorney General" with "Secretary of Homeland Security" in a different inadmissibility provision of the INA "indicate[d] Congress's intent to divest the Attorney General of authority" in favor of the Secretary *at that time*. 651 F.3d 380, 385 (3d Cir. 2011).

Because no statute confers rulemaking authority over public charge determinations on DHS, DHS has no such authority. *See Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

C. Plaintiffs Have Stated a Claim that DHS's Changes to Non-Immigrant Visa Programs Exceed its Statutory Authority

The Governmental Plaintiffs have sufficiently alleged that the Rule exceeds DHS's authority by applying a public charge determination to non-immigrants. Gov't Compl. ¶¶ 133-37. Congress established the public charge exclusion for individuals applying for admission to the United States, either through visas or through adjustment of status for permanent residency. *See* 8 U.S.C. § 1182(a)(4). The exclusion has never applied to non-immigrant applicants, such as students, tourists, and certain kinds of temporary workers, seeking to extend or change the status of their non-immigrant visas. 8 U.S.C. § 1101(a)(15); 8 U.S.C. § 1184.

Defendants' insistence that the new "condition" on visa extension is "manifestly not a public-charge determination," Gov't Mot. 27, rings hollow when the Rule applies the same "12/36 definition" of public charge to non-immigrants and uses the same policy goals from PRWORA to justify the change, *id*. Although the evaluation of whether an applicant seeking

changes to non-immigrant visa status focuses on past instead of future use of benefits, 84 Fed. Reg. at 41,329, the Rule plainly adds a public charge assessment for these individuals; all non-immigrants that use 12 months of benefits within a 36-month period are denied permission to stay in the country.

DHS's general discretion over the terms of non-immigrants' stays in the country does not allow the agency to simply import the public charge exclusion from the admissibility context into the visa-change and extension context, where it has never applied. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010) (in statutory interpretation, there is no "valid reason to impose requirements from one part of the statute onto another") (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). Despite Congress's interest in ensuring that foreign citizens "within the Nation's borders not depend on public resources to meet their needs," 8 U.S.C. § 1601(2)(A), Congress has never amended the public charge provision to address benefits use by non-immigrants. The Governmental Plaintiffs thus state a plausible claim that DHS's changes to the non-immigrant visa process exceed the agency's authority. *See Carter*, 822 F.3d at 56.

D. Plaintiffs Have Stated a Claim that the Rule is Contrary to Law Because it is Unlawfully Retroactive

Absent "express terms," "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 209 (1988). The Organizational Plaintiffs plausibly state a claim that the Rule operates retroactively because it "attaches a new disability in respect to transactions or considerations already past," *Nat'l Mining Ass'n v. Dep't of Interior,* 177 F.3d 1, 8 (D.C. Cir. 1999), and therefore exceeds DHS's rulemaking authority. *See Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 158-59 (2d Cir. 1999). *See* MRNY Compl. ¶¶ 134-45.

Defendants' assertion that the Rule is "carefully crafted to avoid any material retroactive effect," MRNY Mot. 29, ignores how the Rule works. Defendants insist, for example, that "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." *Id*. But the revised Declaration of Self-Sufficiency form ("Form I-944") that accompanies the Rule requires applicants to disclose whether they have "**EVER** received" any of the benefits covered by the Rule, including newly added supplemental benefits like SNAP, housing assistance, and federal Medicaid.[28] *See* MRNY Compl. ¶ 138. There is no reason to require the disclosure of supplemental benefits use prior to the effective date unless that information is impermissibly being used in public charge determinations.[29]

The Rule also, for the first time, assesses applicants' credit scores and English language proficiency. These new factors punish immigrants for decisions that would not have been expected to affect an applicant's public charge status when made. For example, an applicant who has made reasonable financial decisions, such as taking out a car loan to assist in becoming financially stable, can now be penalized for the effect that past decision has on her credit score. MRNY Compl. ¶ 141. And an applicant who postponed investing in expensive English literacy

[28] I-944, Declaration of Self-Sufficiency, USCIS, https://www.uscis.gov/i-944 (last visited Feb. 27, 2020). The instructions to the updated form explain that applicants are not required to disclose benefits "received before October 15, 2019," if they were not considered under the Field Guidance. This is inadequate for two reasons. First, this caveat does not appear on the Form I-944 itself, which still asks applicants to disclose whether they have "**EVER** received" the newly designated benefits. Second, the Rule's effective date is *February 24, 2020*—not October 15, 2019—so even these Instructions still require disclosure of receipt of supplemental benefits not subject to the Rule.

[29] The Rule also retroactively punishes past receipt of cash assistance. Under the Field Guidance, noncitizens may be found inadmissible as a public charge only if they are likely to receive sufficient cash benefits to make them "primarily dependent on the government for subsistence." 64 Fed. Reg. at 28,689. Under the Rule, however, DHS "will consider as a negative factor . . . *any amount of cash assistance*" previously received or certified for receipt. 8 C.F.R. § 212.22(d) (emphasis added). Even if noncitizens have had "fair notice" that receipt of cash benefits would be considered in the public charge analysis, MRNY Mot. 30 n.4, the Rule impermissibly penalizes past receipt of cash assistance that, at the time it was received, would not have resulted in a public charge determination. MRNY Compl. ¶¶ 136-37.

classes can be similarly penalized even though, at the time the decision was made, adjustment of status determinations did not consider English language proficiency. MRNY Compl. ¶ 142. These factors distinguish this case from *McAndrews v. Fleet Bank of Massachusetts, N.A.*, 989 F.2d 13 (1st Cir. 1993) (cited in MRNY Mot. 29-30), where the court determined that applying a new statute to an old lease was not impermissibly retroactive because the new statute "was brought into play through a collocation of circumstances, *all occurring well after the law's effective date*." *Id.* at 16 (emphasis added). Here, the Rule threatens to punish immigrants for decisions they made *prior* to the Rule's effective date—which decisions could not have been expected to prejudice their status adjustment applications when made.

E. Plaintiffs Have Stated a Claim that the Rule is Contrary to PRWORA

The Governmental Plaintiffs have stated a claim that the Rule upends the careful balance that Congress struck in PRWORA. *See* Gov't Compl. ¶¶ 129-31, 276. First, the Governmental Plaintiffs adequately allege that PRWORA reflects Congress's judgment that, consistent with policy goals of immigrant self-sufficiency, supplemental benefits should be made available to qualified immigrants. *See supra* Section II.A.4.

Additionally, the Governmental Plaintiffs have plausibly alleged the Rule frustrates Congress's intent to delegate to states the authority to determine Medicaid eligibility. *See* Gov't Compl. ¶¶ 129-31; *Soskin v. Reinertson*, 353 F.3d 1242, 1246 (10th Cir. 2004) (explaining that PRWORA allows States to "redefine 'qualified aliens' to cover additional legal aliens, so long as they do not cover those aliens explicitly excluded by PRWORA"). Under PRWORA, each state may independently control the requirements for immigrant enrollment in the program. 8 U.S.C. § 1612(b); *see Soskin*, 353 F.3d at 1257 ("[T]he choice by one state to grant or deny Medicaid benefits to an alien does not require another state to follow suit."). The Rule, however, renders state discretion meaningless by heavily penalizing immigrants deemed eligible by states to enroll

in Medicaid, and thereby deterring those immigrants from using Medicaid. The Rule thus undermines Congress's decision in PRWORA to preserve state authority and discretion over the administration of Medicaid benefits to immigrant communities.

F. Plaintiffs Have Stated a Claim that the Rule is Contrary to the SNAP Statute

The Governmental Plaintiffs have plausibly stated a claim that the Rule is contrary to law because it runs counter to both the mandate and the plain statutory text of the SNAP statute (known as the "Food Stamp Act" prior to 2008) and its progeny by penalizing immigrants for receipt of SNAP benefits. *See* Gov't Compl. ¶¶ 47, 130, 203-05, 275. The Food Stamp Act, its subsequent amendments, and related legislative history make clear that Congress intended to maximize participation in the program among eligible households so as "to rais[e] levels of nutrition among low-income households" and to "establish[] and maintain[] adequate national levels of nutrition." 7 U.S.C. § 2011. For example, in testimony before the House Committee, then-Secretary of Agriculture Clifford Hardin explained that the 1971 revisions were necessary to "encourage . . . rather than discourage . . . participation in th[e] program." *Hearings on H.R. 12430 and H.R. 12222 before the H. Comm. on Agric.*, 91st Cong., 1st Sess., Serial Q, Part 1, at 8 (1969). Congressional enactments in the wake of PRWORA confirmed that Congress intended to maximize participation in the Food Stamp program for all eligible households, including households with eligible immigrants.[30]

Accordingly, Congress designed Section 2017(b) of the Food Stamp Act to maximize participation by expressly prohibiting actions that penalize beneficiaries for receiving SNAP

[30] *See* Agricultural Research, Extension, and Education Reform Act of 1998, Pub. L. No. 105-185, 112 Stat. 523 (restoring food stamp eligibility for certain immigrants who resided in the United States when PRWORA was enacted); The Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (restoring eligibility for food stamps to children and certain immigrants with disabilities regardless of how long they have been in the country).

benefits. The provision provides that "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) (emphasis added). Indeed, even indirect action to deter food stamp access runs counter to the SNAP statute. *See, e.g.*, *Foster v. Ctr. Twp. of La Porte Cty.*, 527 F. Supp. 377, 379 (N.D. Ind. 1981) (congressional intent would be "thwarted" if food stamp participation were penalized); *Dupler v. Portland*, 421 F. Supp. 1314, 1318 (D. Me. 1976) (deterring food stamp participation "frustrate[s]" the purpose of the Food Stamp Act).

Defendants' argument that the Rule does not violate the SNAP statute because DHS considers only the "*fact of receipt*" and not the "value" of SNAP benefits is a myopic and perverse interpretation of the statute that runs counter to the statute's context and purpose. Gov't Mot. 31. Congress's decision to prohibit agencies from counting against recipients the value of SNAP benefits as income or resources would be meaningless if DHS were permitted to penalize the mere *fact* of receipt. *See Gooderham v. Adult & Family Servs. Div.,* 667 P.2d 551 (Or. App. 1983) ("The Act makes crystal clear current law preventing state or local governments from reducing benefits provided [to] food stamp recipients under other laws . . . because of their *receipt* of food stamps." (emphasis added) (citing H.R. Rep. No. 95-464, at 246, *as reprinted in* 1977 U.S.C.C.A.N. 1978, 2191)). "Manifestly, that congressional intent [behind the Act] is frustrated" when "a substantial number of eligible households do not receive" the nutritional supplements to which Congress deemed them entitled. *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 820 (D.C. Cir. 1975).

Defendants' contention that the Rule is lawful because the statute permits "consideration of the fact of receipt of SNAP benefits by other statutes or regulations" is similarly misplaced. Gov't Mot. 31. Defendants point to a regulation that considers receipt of benefits from an

enumerated federal assistance program, including SNAP, to determine whether a consumer is eligible to participate in Lifeline, a program that provides internet and telephone subsidies to "qualifying low-income consumers." *Id.* (citing 47 C.F.R. § 54.409). Nothing in this regulation deters eligible individuals from receiving SNAP benefits, penalizes those who have received such benefits, or otherwise undermines the fundamental goal of the SNAP statute—to increase access to nutritious food.

G. Plaintiffs Have Stated a Claim that the Rule is Arbitrary and Capricious

Defendants are not entitled to dismissal of Plaintiffs' claims that the Rule is arbitrary and capricious under the APA. The Court has already rejected as irrational Defendants' justifications for DHS's change to the public charge definition and the public charge test. Plaintiffs have plainly stated a plausible—indeed probable—chance of demonstrating that Defendants failed to provide a reasonable explanation for the Rule and failed to show a rational connection between its own public charge definition and public charge test. Plaintiffs have also demonstrated that the Rule is arbitrary and capricious because it deems as public charges individuals who use benefits on a short-term or emergency basis. Finally, Plaintiffs have sufficiently alleged that DHS irrationally ignored evidence before the agency of the magnitude of the Rule's chilling effects.

1. DHS Fails to Offer A Reasonable Explanation for the Rule

The Court properly concluded that DHS's overhaul of the public charge definition lacks "reasonable explanation" and defies "logic." *New York*, 408 F. Supp. 3d at 348; *MRNY*, 2019 WL 5484638, at *8. Despite Defendants' repeated emphasis on immigrant self-sufficiency as justification for the Rule, DHS is unable to show a rational connection between self-sufficiency and the use of supplemental benefits like food stamps, healthcare, and housing assistance. *E.g.*, Gov't Mot. 1, 17, 36, 42; MRNY Mot. 1, 17, 34-35. The Rule equates temporary receipt of minimal amounts of a supplemental benefit—as little as $4 per day in food stamps—with a long-

term lack of self-sufficiency. *See* MRNY Compl. ¶ 117; *City & Cty. of S.F. v. USCIS*, 408 F. Supp. 3d 1057, 1099 (N.D. Cal. 2019) ("To take a plausible example, someone receiving $182 over 36 months . . . in SNAP benefits is a public charge under the Rule."). But Plaintiffs have plausibly pled that this determination "rests upon factual findings that contradict those which underlay [Defendants'] prior policy" and find no support in the record before DHS. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

Plaintiffs allege that these supplemental, non-cash benefits are designed to promote self-sufficiency, not to serve as evidence of its absence. As expert benefit granting agencies have concluded, individuals receiving supplemental benefits are not necessarily dependent on the government for basic necessities and may have incomes "far above the poverty level." 64 Fed. Reg. at 28,692. Indeed, the vast majority of food stamp, Medicaid, and housing assistance recipients work. *See* Gov't Compl. ¶¶ 43, 47, 68, 88, 101; MRNY Compl. ¶¶ 116-30. The Court thus correctly reasoned that a self-supporting individual may elect to accept a supplemental benefit "simply because she is entitled to it." *New York*, 408 F. Supp. 3d at 348; *MRNY*, 2019 WL 5484638, at *8. The Rule acknowledges that DHS received overwhelming evidence that these supplemental benefits enhance upward mobility and decrease the likelihood of future dependence. *See, e.g.*, 84 Fed. Reg. at 41,352, 41,365, (summarizing comments describing how the enumerated benefits promote self-sufficiency). Plaintiffs have met their minimal burden at the pleading stage of alleging that consideration of such benefits in the public charge determination is irrational.

Contrary to Defendants arguments, Gov't Mot. 33-34; MRNY Mot. 34, nothing in PRWORA or other congressional enactments supports DHS's public charge definition. The government's "expenditures on non-cash benefits" do not reflect a problem for DHS to address,

83 Fed. Reg. at 51,164, but rather demonstrate Congress's choice to fund benefits programs that improve public health and economic stability. *See* Gov't Compl. ¶ 44; MRNY Compl. ¶ 75. By radically realigning the public charge framework to disfavor working class immigrants who qualify for supplemental benefits, DHS ignores Congress's calibrated judgment to provide these supplemental benefits to eligible immigrants. *See supra* Section II.A.4.

2. The Public Charge Test Does Not Rationally Predict Self-Sufficiency

Plaintiffs have stated a plausible claim that the Rule's new public-charge test is arbitrary and capricious because it does not rationally predict whether an individual will meet even DHS's own definition of public charge. While the INA permits DHS to consider factors other than those enumerated in the statute, 8 U.S.C. § 1182(a)(4)(B)(i), these additional factors must bear some rational relationship to a public charge finding. *See, e.g.*, *Michigan v. EPA,* 135 S. Ct. at 2706 (agency action must result from "logical and rational" process); *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 52 (1983) (agency action must rest "on a consideration of the relevant factors"). But Plaintiffs have sufficiently alleged that the Rule's new test is untethered from any assessment of whether an immigrant will become a long-term dependent on governmental resources or even use 12 months of public benefits within a 36-month period. The Court reasonably concluded that DHS "fail[ed] to demonstrate rational relationships between many of the additional factors enumerated in the Rule and a finding of benefits use." *New York*, 408 F. Supp. 3d at 349; *MRNY*, 2019 WL 5484638, at *9.

For example, the Rule assigns negative weights to low English proficiency and larger family size, even though these factors do not measure an individual's ability to be self-sufficient. Gov't Compl. ¶¶ 153-55; MRNY Compl. ¶ 178. As the Court observed, "one can certainly be a productive and self-sufficient citizen without knowing *any* English," and "[i]t is simply offensive to contend that English proficiency is a valid predictor of self-sufficiency." *New York*, 408 F.

Supp. 3d at 349, *MRNY*, 2019 WL 5484638, at *9. Indeed, the data on which DHS relies, Gov't Mot. 38-39; MRNY Mot. 35, demonstrate that the vast majority of people with limited English skills and larger families do not use any public benefits at all. These data show:

- 75.4% of people who do not speak English well do not use benefits. 83 Fed. Reg. at 51,196.
- 68.7% of people who do not speak English *at all* do not use benefits. *Id.*
- 79.2% of people in families of four do not use benefits. *Id.* at 51,185.
- 65.5% of people in families of five do not use benefits. *Id.*

Defendants may not prevail on a motion to dismiss simply because certain factors, like lack of English proficiency, make benefits use marginally more likely. Defendants' reliance on this data misses the crucial point that these factors do not demonstrate an *overall* likelihood of using benefits. For example, data may show that a person who makes $900,000 per year is marginally more likely to use benefits than a person who makes $1 million per year, but that does not mean that either person is likely in the aggregate to use benefits. DHS could not rationally set the income threshold for public charge determinations at $1 million simply because it found that people making less than $1 million were more likely to enroll in benefits programs. Likewise, DHS's finding that people who speak English well are less likely to use benefits than people who do not, 83 Fed. Reg. at 51,196 (18% of people who speak English well use benefits, compared to 24.6% of people who do not speak English well), provides no meaningful information, on its own, about whether either group is likely to become a public charge.[31]

[31] Further evidence that the Rule's treatment of English proficiency is arbitrary and capricious comes from a contradictory position taken by the Social Security Administration (the "SSA") just this week. On February 25, 2020, the SSA published a final rule removing the education category "inability to communicate in English" from its evaluations of disability claims for adults under the Social Security Act. *Removing Inability to Commincate in English as an Education Category*, 85 Fed. Reg. 10,586 (Feb. 25, 2020). Relying on Census Bureau data (just as the Rule does), the SSA concluded that that "inability to communicate in English" is "no longer a reliable indicator of an individual's educational attainment or the vocational impact of an individual's education." *Id.* The SSA's notice

Defendants offer no explanation for ignoring the larger context that the vast majority of people who do not speak English well do not use benefits of any kind.[32]

Plaintiffs also allege that DHS fails to provide any rational basis for considering credit scores in the public charge test. Gov't Compl. ¶ 167; MRNY Compl. ¶ 178. Despite their unfounded argument that credit scores "provide an indication of the relative strength or weakness of an individual's financial status," Gov't Mot. 39, MRNY Mot. 35, the Rule acknowledges that most recent immigrants, regardless of financial status, lack the credit history to support favorable credit scores. *See* 83 Fed. Reg. at 51,189. The Court correctly found that a person's credit score is not "indicative of her likelihood to receive 12 months of public benefits." *New York*, 408 F. Supp. 3d at 349 n.3, *MRNY*, 2019 WL 5484638, at *9 n.2. Plaintiffs further allege that the Rule irrationally denies a heavily positive factor using tax credits under the Affordable Care Act ("ACA") to obtain insurance, even though enrollment in a private insurance plan is a heavily positive factor and these tax credits are available to individuals who earn up 400 percent of the federal poverty line. *See* Gov't Compl. ¶ 143; MRNY Compl. ¶ 166. The Rule cites to no evidence that recipients of ACA credits are likely to use Medicaid or any other supplemental benefit. And, importantly, the public was denied the ability to comment on this aspect of the Rule because it was not included in the NPRM. MRNY Compl. ¶ 188.

Defendants' refrain that the Rule retains the totality of circumstances test simply because

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of proposed rulemaking made clear that "data indicate that work opportunities have expanded and labor force participation has increased for individuals who may fall within the 'inability to communicate in English' education category." 84 Fed. Reg. 1,006 (Feb. 1, 2019). These conclusions contrast sharply with the NPRM and Rule in this matter, in which DHS found that that "[a]n inability to speak and understand English may adversely affect whether an alien can obtain employment" that "numerous studies have shown that immigrants' English language proficiency or ability to acquire English proficiency directly correlate to a newcomer's economic assimilation into the United States." 83 Fed. Reg. at 51,195-96; *see* 84 Fed. Reg. at 41,432 & n.711.

[32] Defendants also are wrong that the data they cited show that non-English speakers were more likely than English-speakers to become public charges under the Rule's definition. The data simply show whether a relevant group uses benefits; they do not reflect the length or amount of benefits use. 83 Fed. Reg. 51,195-96.

"the presence of a single positive or negative factor . . . *will never*, on its own, create a presumption that an applicant is inadmissible," Gov't Mot. 37, does not excuse the consideration of irrational factors that skew the results of the public charge test. An irrational factor, even if not outcome-determinative, still imposes a barrier to admissibility that must be affirmatively overcome. The possibility that an irrational factor "may be counterbalanced by other factors," Gov't Mot. 30; MRNY Mot. 32, does not render the test immune from challenge.

Moreover, Plaintiffs have alleged that many of the new factors are so duplicative that certain circumstances, such as a brief period of financial strain or a disability, count multiple times against applicants and stack the deck against admission. For example, an applicant with a steady job who uses Medicaid for a disability receives both negative and heavily negative factors for the disability itself, the application for and receipt of Medicaid, and the lack of private insurance. MRNY Compl. ¶¶ 165-66. This cumulative effect virtually ensures that this immigrant will be barred as a public charge regardless of whether he can support himself in the future. *See WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 102-03 (D.D.C. 2010) (agency action arbitrary where agency failed to consider "cumulative effect" of individual factors).

3. The Rule's Aggregate-Counting System is Arbitrary and Capricious

Plaintiffs have stated a claim that the Rule's public charge definition irrationally encompasses immigrants who use benefits on a short-term or emergency basis. In assessing the duration of benefits use, the Rule arbitrarily counts the use of two benefits in a single month as two separate months of benefits use. 8 C.F.R. § 212.21(a). This aggregate-counting system undermines DHS's own conclusion that a public charge determination requires long-term reliance on public benefits. DHS claims that the new public charge definition does not cover "short-term and intermittent access to public benefits." 84 Fed. Reg. at 41,361. The Rule purports to use a 12-month threshold as a "bright-line rule" to differentiate between long-term

and short-term benefits use. *Id.* at 41,360-61. But Plaintiffs plausibly allege that the aggregate-counting system ensures that many immigrants who use benefits for a shorter period of time fall within the public charge definition. Gov't Compl. ¶¶ 118-21, 125; MRNY Compl. ¶¶ 101-02, 198. For example, an individual who uses three benefits to weather a temporary hardship becomes a public charge after just four months.

DHS fails to provide any rational explanation for shortening the benefits threshold below its own 12-month "bright-line." Even if "receipt of multiple benefits" in a single month indicates that the individual used more in government assistance that month, *id.* at 41,361, it does not alter the short-term nature of such assistance. The Rule's "unexplained inconsistency" in its definition of public charge is arbitrary and capricious. *See Dist. Hosp. Partners v. Burwell*, 786 F.3d 46, 58-59 (D.C. Cir. 2015).

4. The Rule Fails to Adequately Consider and Quantify Significant Harms

Plaintiffs have adequately pled that DHS's disregard for overwhelming evidence of the Rule's public health and economic consequences is arbitrary and capricious. *See e.g.*, Gov't Compl. ¶¶ 191-93; MRNY Compl. ¶ 186. In general, "the costs of an agency's action are a relevant factor that the agency must consider before deciding whether to act." *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732 (D.C. Cir. 2016). And agencies must "respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n.*, 575 U.S. 92, 96 (2015). An agency has not adequately responded to significant comments if it "defies the expert record evidence," fails "to address the[] comments, or at best . . . attempt[s] to address them in a conclusory manner," *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 93-94 (D.C. Cir. 2010), or does not address significant criticism of data forming the basis of the rule, *see FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 332-33 (D.D.C.

2016). Here, DHS's failure to adequately consider the magnitude of the harms and calculate the costs that will result from the Rule, or to address multiple significant comments raising these exact issues is arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

First, DHS "failed to consider an important aspect of the problem," *id.*, by refusing to grapple with the magnitude of the Rule's harms. *See Mingo Logan*, 829 F.3d at 732-33 (explaining that the "costs of an agency's action are a relevant factor that the agency must consider") (Kavanaugh, J., dissenting). DHS refused to assess or meaningfully consider the substantial harms from widespread benefits disenrollment caused by the Rule. *See, e.g.*, Gov't Compl. ¶¶ 168-173; MRNY Compl. ¶¶ 186, 246, 259. Instead, DHS declared that it lacked information to quantify or assess the Rule's costs. *See* 84 Fed. Reg. at 41,312-14; RIA at 104. But DHS received extensive information on the full scope of the Rule's harms and simply failed to "adequately analyze the . . . consequences of [its] changes." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017). And given DHS's reliance on a purported lack of information, its conclusion that the Rule "will ultimately strengthen public safety, health, and nutrition," 84 Fed. Reg. at 41,314, is impermissibly based on "sheer speculation," *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) (quotation marks omitted).

Second, the Rule contains no reasoned explanation for how the harms caused by the Rule may be justified by any purported gains. DHS identified no actual negative consequences from the current public charge regime aside from the fact that it grants permanent resident status more often than the Rule would. *See* 84 Fed. Reg. at 41,312. But given that the Rule indisputably repudiates the agency's long-standing prior policy and factual findings, DHS was required to at least "show that there are good reasons for the new policy." *Fox Television*, 556 U.S. at 515. DHS's desire to deny many more immigrants permanent resident status is simply a "solution" in

search of any rational justification.

In their motion to dismiss, Defendants claim that the Rule will save public-benefit programs money as immigrants forgo benefits or are deemed inadmissible. *See* Gov't Mot. 34-35. But factual inferences at this stage must be construed in Plaintiffs' favor. *Rich*, 939 F.3d at 117 n.2. Furthermore, in the Rule, DHS disclaimed reliance on drops in benefit-program spending to justify the Rule, asserting that the Rule "does not aim" to "curtail spending on public assistance." 84 Fed. Reg. at 41,305. And decreased spending on public benefits results not in a gain but in massive public health and economic harms to Plaintiffs, their residents and constituents, and the public. *See* Gov't Compl. ¶¶ 212-34; MRNY Compl. ¶¶ 240-70. At minimum, it is arbitrary and capricious for DHS to quantify and consider purported gains from agencies spending on less supplementary programs while claiming that it cannot quantify or fully consider the concomitant harms from such spending decreases, especially because it failed to adequately consider the evidence before it of the suffering that the Rule will impose. *See Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 60 (D.D.C. 2019) ("[I]t is the very definition of arbitrariness in rulemaking if an agency refuses to acknowledge (or fails to obtain) the facts and figures that matter prior to exercising its discretion to promulgate a rule."); *Humane Soc'y of U.S. v. Zinke*, 865 F.3d 585, 606 (D.C. Cir. 2017) ("[A] failure to address 'an important aspect of the problem' that is factually substantiated in the record is unreasoned, arbitrary, and capricious decisionmaking." (quoting *State Farm*, 463 U.S. at 43)).

5. The Rule Relies on a Flawed Legal Interpretation of Administrative Precedent

Governmental Plaintiffs have stated a claim that the Rule is arbitrary and capricious because it relies on flawed understandings of administrative precedent interpreting "public charge." Gov't Compl. ¶¶ 122, 287. "[A]n agency decision that is based on an erroneous legal

premise cannot withstand arbitrary-and-capricious review." *Batalla Vidal* 279 F. Supp. 3d at 420.

Defendants misinterpret *Matter of Vindman* and *Matter of Harutunian* as support for the Rule's expansion of public charge to cover individuals who receive temporary and supplemental public assistance. 84 Fed. Reg. at 41,349. Both *Vindman* and *Harutunian* concluded that Congress did not intend for individuals capable of working or supported by family members to be considered public charges, even if they use supplementary benefits. *Matter of Harutunian*, 14 I. & N. Dec. at 589; *Matter of Vindman*, 16 I. & N. Dec. 131, 132 (B.I.A. 1977). The public charge inquiry in both cases focuses, in accordance with congressional intent, on the likelihood of future dependence. *Vindman* clarified that "while economic factors should be taken into account, the alien's physical and mental condition, *as it affects ability to earn a living*, is [of] major significance." 16 I. & N. Dec. at 132 (emphasis added) (quoting *Harutunian*). And *Harutunian* explicitly distinguished between "old age assistance [which] is individualized public support to the needy," which could give rise to a public charge determination, and "essentially supplementary benefits, directed to the general welfare of the public as a whole," which could not. 14 I. & N. Dec. at 589. Indeed, 1999 Field Guidance cited *Harutunian* as support for the agency's definition of public charge as one who is primarily dependent on income-replacement benefits. *See* 64 Fed. Reg. 28,691 n.8. DHS now, without explanation, interprets the same case to support to a radically different conclusion.

Defendants' cherry-picked quotations do not further the argument that DHS has unfettered discretion over admissibility determinations. *See* Gov't Mot. 39. While *Vindman* and *Harutunian* acknowledge the agency's role to make individualized public charge decisions based on a range of factors, both cases found such decisions to be ultimately constrained by congressional intent. *Vindman*, 16 I. & N. Dec. at 132; *Harutunian*, 14 I. & N. Dec. at 589.

H. The Rule's Treatment of Individuals with Disabilities Is Contrary to the Rehabilitation Act, and Is Arbitrary and Capricious

Plaintiffs far exceed the plausibility standard in alleging that the Rule is contrary to Section 504 of the Rehabilitation Act and DHS's implementing regulations. *See* Gov't Compl. ¶¶ 146-50; MRNY Compl. ¶¶ 154-71. Section 504 of the Rehabilitation Act provides that no individual "shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination" under any activity conducted by a federal agency. 29 U.S.C. § 794(a). "Exclusion or discrimination [under Section 504] may take the form of disparate treatment, disparate impact, or failure to make a reasonable accommodation." *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016).

As the Court found, Plaintiffs raise "at least a colorable claim" that the Rule violates the Rehabilitation Act. *New York*, 408 F. Supp. 3d at 349; *MRNY*, 2019 WL 5484638 at *10. DHS admits that disability in and of itself is a negative factor. Gov't Mot. 28-29; MRNY Mot. 30-31. And the Rule fails entirely to consider whether an immigrant's disability may be reasonably accommodated. Defs.' Opp'n to Mot. for Prelim. Inj., Gov't Dkt. 99, at 30 (arguing that reasonable accommodation does not exist). Consequently, immigrants with disabilities, regardless of whether they are able to work or learn with an accommodation, receive a negative factor that able-bodied immigrants do not. This discriminatory treatment of, and refusal to accommodate, individuals with disabilities cannot be reconciled with the Rehabilitation Act's mandate to ensure "that disabled individuals receive 'evenhanded treatment' in relation to the able-bodied." *Doe v. Pfrommer*, 148 F.3d 73, 83 (2d Cir. 1998).

Defendants and the Ninth Circuit incorrectly conclude that the Rule is lawful because disability would merely "constitute one factor to be considered in the [public-charge] test." Gov't Mot. 29; MRNY Mot. 31; *San Francisco*, 944 F.3d at 799-800. Section 504 prohibits DHS from

subjecting an applicant to a "more onerous" public charge standard solely because of her disability. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 276 (2d Cir. 2003). And DHS's own regulations prohibit DHS from "utiliz[ing] criteria or methods of administration the purpose or effect of which would (i) subject qualified individuals with a disability to discrimination on the basis of disability; or (ii) defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with a disability." 6 C.F.R. § 15.30(b)(4).

Additionally, Plaintiffs have adequately pled that the Rule irrationally treats individuals with disabilities as unlikely to be self-sufficient. Gov't Compl. ¶¶ 146-50. The Rule effectively bars people with disabilities from admission not only by imposing a negative factor for disability alone, but also double-counting disability-related factors, such as use of Medicaid to treat a disability. *See supra* Section II.G.2. Defendants' and the Ninth Circuit's reasoning that the INA's enumerated "health" factor authorizes the agency to discriminate on the basis of disability is misguided. The INA requires the agency to consider health conditions that bear on an individual's likelihood of becoming a public charge. While certain disabilities, such as those that require long-term institutionalization, may be relevant to the health inquiry, many conditions that require extensive medical treatment, such as diabetes or mobility impairments, are not. DHS's conclusion that individuals with disabilities, regardless of the limitations imposed by and accommodations available for those disabilities, are less likely than the able-bodied to support themselves belies the evidence before the agency. The Court properly observed that, to the contrary, "many individuals with disabilities live independent and productive lives." *New York*, 408 F. Supp. 3d at 350; *MRNY*, 2019 WL 5484638, at *10.

III. Plaintiffs Have Stated a Claim that the Rule Violates the Equal Protection Guarantee in the Constitution

Plaintiffs state a plausible claim that the Rule violates Equal Protection principles

because it was motivated by animus against low-income noncitizens of color and disproportionately impacts members of those groups even when they do not use benefits. *See* Gov't Compl. ¶¶ 138-45; 151-56, 174-78; MRNY Compl. ¶¶ 201-39. Indeed, this Court previously determined that "Plaintiffs have sufficiently demonstrated a likelihood of success on the merits of their equal protection claim." *MRNY*, 2019 WL 5484638, at *10.

Defendants' argument that these allegations are insufficient is rooted in (1) a radical proposition that executive agencies are entitled to extraordinary deference when they promulgate rules relating to immigration, and (2) a pretense that well-documented animus of high-level officials, including the President, have no bearing on the Rule. Both arguments cannot be countenanced, particularly on a motion to dismiss when Plaintiffs' allegations must be credited.

First, Defendants point to *Trump v. Hawai'i*, 138 S. Ct. 2392, 2411 (2018) to say that any executive action addressing immigration is subject to a "highly deferential" and "narrow" standard of review. Gov't Mot. 42; MRNY Mot. 43-44. But the Supreme Court's use of rational basis review in *Trump v. Hawai'i* "was based on two considerations not at issue here: first, the limited due process rights afforded to foreign nationals seeking entry into the United States, and the particular deference accorded to the executive in making national security determinations." *Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 411 (D. Mass. 2018) (citation omitted). These considerations do not apply to immigrants who "are living and have lived in the United States for lengthy periods with established ties to the community." *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1108 (N.D. Cal. 2018). The Supreme Court recently recognized that rules based on suspect classifications are subject to heightened scrutiny when applied to immigrants in the United States. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689-90 (2017) (applying heightened scrutiny to gender-based classifications in INA's citizenship provisions);

see also Tineo v. Att'y Gen. of the U.S., 937 F.3d 200, 210 (3d Cir. 2019) (overturning prior ruling that rational basis review applied to gender-based classification in citizenship rules).

There is no support for Defendants' apparent position that the Executive Branch can promulgate rules that are contrary to the immigration laws made by Congress or the Constitution and leave those injured by such rules without effective recourse in the courts. "Executive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation . . . and if that authority is exceeded it is open to judicial review." *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983). Defendants' argument that the standard for such review is heightened beyond ordinary equal protection principles simply because the court is presented with an immigration-related regulation is baseless.

Second, Plaintiffs have alleged, and—as this Court recognized—"Defendants do not dispute[,] that the Rule will disparately impact noncitizens of color." *MRNY*, 2019 WL 5484638 at *10; *see* Gov't Compl. ¶ 151-56; MRNY Compl. ¶¶ 235-39. Defendants cannot quarrel with Plaintiffs' well-pled allegations, and instead argue that the decision-makers within DHS cannot be held accountable for express statements of animus made by "non-DHS personnel." Gov't Mot. 43; MRNY Mot. 45. This argument is wrong on both the facts and the law. Plaintiffs cite ample evidence of animus from DHS personnel as well as from those with the power to hire and fire them in the Trump Administration. Gov't Compl. ¶¶ 174-78; MRNY Compl. ¶¶ 203-34.

Furthermore, courts addressing similar constitutional claims have held that where high-level officials who "influence[] or manipulate[]" the decision-makers express racial animus, such statements are relevant to review of agency action. *Saget v. Trump*, 375 F. Supp. 3d 280, 369 (E.D.N.Y. 2019) (quoting *Ramos*, 336 F. Supp. 3d at 1098). As the federal district court in Maryland recently found during its review of an equal protection challenge to public charge

provisions in the State Department's Foreign Affairs Manual ("FAM"): "[I]f President Trump harbors animus towards immigrants of color, and if he encouraged the State Department to revise the FAM, then the amendments violate equal protection, even if officials within the State Department did not personally harbor racial animus." *Baltimore*, 2019 WL 4598011, at *19.

In addition, expressions of animus need not be specifically related to the release of the Rule; Plaintiffs do not need to demonstrate a tight nexus between words and actions. *See, e.g.*, *Saget*, 345 F. Supp. 3d at 303-04 (plaintiffs plausibly alleged an equal protection violation based on the President's statements); *CASA de Md., Inc. v. Trump*, 355 F. Supp. 3d 307, 325-26 (D. Md. 2018) (same); *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 810 (S.D.N.Y. 2018) (same); *Centro Presente.,* 332 F. Supp. 3d at 414-15 (same); *Batalla Vidal*, 291 F. Supp. 3d at 279 (rejecting the argument that the President's statements were irrelevant to equal protection challenge to DHS immigration action).

In combination with allegations of the Trump Administration's highly unusual hiring and firing decisions at DHS and USCIS during the course of the development of the Rule, MRNY Compl. ¶¶ 215-19, 223-233, these allegations plausibly allege Equal Protection violations. Plaintiffs need not show either express discrimination or that animus is the sole motivating factor. *See Washington v. Davis*, 426 U.S. 229, 241 (1976); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1223-24 (2d Cir. 1987) (racial animus need only be "a significant factor" motivating government action). Instead, Plaintiffs may demonstrate discriminatory purpose with a range of evidence, including but not limited to (1) "[t]he impact of the official action[,] whether it bears more heavily on one race than another"; (2) the historical background of a policy decision, "if it reveals a series of official actions taken for invidious purposes" as well as "administrative history . . . especially where there are contemporary statements by members of

the decisionmaking body"; and (3) "[t]he specific sequence of events leading up to the challenged decision." *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 267-68 (1977) (internal citations and quotation marks omitted); *see e.g.*, *Saget*, 375 F. Supp. 3d at 301-03 (rejecting argument that *Trump v. Hawai'i* applied to equal protection challenge of DHS action rescinding temporary protected status of certain noncitizens residing in the United States and finding that plaintiffs stated a claim under the *Arlington Heights* standard).[33] These factors, read in light of Plaintiffs' allegations, are more than sufficient to state a claim that the Rule was motivated by discriminatory animus.

The Rule does not satisfy even ration basis scrutiny. Animus against a particular group "lacks a rational relationship to legitimate state interests." *Romer v. Evans*, 517 U.S. 620, 632 (1996); *see City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985) ("Furthermore, some objectives—such as a bare desire to harm a politically unpopular group—are not legitimate state interests" under rational basis review) (quotation marks, alteration, and citation omitted)); *City of Yonkers*, 837 F.2d at 1226. As this Court previously explained in determining Plaintiffs were likely to succeed on the merits of their Equal Protection claim: "even under the highly deferential standard advanced by Defendants, Defendants have yet to articulate a rational relationship between the disparity of treatment and some legitimate government purpose." *MRNY*, 2019 WL 5484638, at *10. Plaintiffs have more than adequately pled that the Rule is motivated by discriminatory animus.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' motions to dismiss.

[33] *Accord Centro Presente*, 332 F. Supp. 3d at 409-12 (same); *Ramos*, 336 F. Supp. 3d at 1105-09 (applying same analysis in issuing preliminary injunction); *Batalla Vidal*, 291 F. Supp. 3d at 274-77 (applying *Arlington Heights* to review of equal protection challenge to DHS's decision to rescind Deferred Action for Childhood Arrivals program).

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Respectfully submitted,

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