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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, *et al.* Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	Case No. 3:19-cv-04975-PJH **DEFENDANTS' MOTION TO DISMISS THE COMPLAINT** Date: June 10, 2020 Time: 9:00 a.m. Courtroom: 3 Judge: Hon. Phyllis J. Hamilton

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on June 10, 2020, at 9:00 a.m. or as soon thereafter as it may be heard before Chief Judge Phyllis J. Hamilton, Defendants will and do hereby move for an order dismissing Plaintiffs' complaint in this matter. This motion is based on this notice and the below Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On October 11, 2019, the Court issued a preliminary injunction against the Department of Homeland Security's final rule *Inadmissibility on Public Charge Grounds* ("Rule"), 84 Fed. Reg. 41292 (Aug. 14, 2019). *See* Prelim. Inj. ("PI Order"). The Court based its decision on the narrow grounds that, in its view, Plaintiffs were likely to prevail on their claims that the Rule's definition of "public charge" is contrary to the Immigration and Nationality Act ("INA") and is arbitrary and capricious. The Court held that Plaintiffs were unlikely to succeed on various other claims, including that the Rule is contrary to the Rehabilitation Act, and the Court did not pass judgment on Plaintiffs' claims that the Rule violates the Equal Protection component of the Fifth Amendment Due Process Clause. Since then, the Ninth Circuit Court of Appeals has issued a detailed opinion concluding that the Rule falls well within the Executive Branch's discretion to interpret and implement the public charge inadmissibility provision in the INA and is not arbitrary or capricious. *See City and Cty. of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). Particularly in light of the Ninth Circuit's ruling, and for the reasons discussed herein, Defendants respectfully submit that the Court should dismiss Plaintiffs' Complaint in full.

BACKGROUND

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

public benefits [is] not [to] constitute an incentive for immigration to the United States." *Id.* § 1601(2)(B).

These statutorily enumerated policies are effectuated in part through the public charge ground of inadmissibility in the INA. With certain exceptions, the INA provides that "[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General, or the Secretary of Homeland Security, at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A). An unbroken line of predecessor statutes going back to at least 1882 have contained a similar inadmissibility ground for public charges, and those statutes have, without exception, delegated to the Executive Branch the authority to determine who constitutes a public charge for purposes of that provision. *See* Immigration Act of 1882, 47th Cong. ch. 376, §§ 1-2, 22 Stat. 214 ("1882 Act"); 1891 Immigration Act, 51st Cong. ch. 551, 26 Stat. 1084 ("1891 Act"); Immigration Act of 1907, 59th Cong. ch. 1134, 34 Stat. 898 ("1907 Act"); Immigration Act of 1917, 64th Cong. ch. 29 § 3, 39 Stat. 874, 876 ("1917 Act"); INA of 1952, 82nd Cong. ch. 477, section 212(a)(15), 66 Stat. 163, 183. Indeed, in a Report leading up to the enactment of the INA, the Senate Judiciary Committee emphasized that because "the elements constituting likelihood of becoming a public charge are varied, there should be no attempt to define the term in the law," and that the public charge inadmissibility determinations properly "rest[] within the discretion of" the Executive Branch. S. Rep. No. 81-1515, at 349 (1950).

In 1996, Congress enacted immigration and welfare reform statutes that bear on the public charge inadmissibility determination. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Division C of Pub. L. No. 104-208, 1110 Stat. 3009-546 (1996) strengthened the enforcement of the public charge inadmissibility ground in several ways. First, Congress instructed that, in making public charge inadmissibility determinations, "the consular officer or the Attorney General shall at a minimum consider the alien's: (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills," 8 U.S.C. § 1182(a)(4)(B), but otherwise left in place the broad delegation of authority to the Executive Branch to determine who constitutes a public charge. IIRIRA also raised the standards

and responsibilities for individuals who must "sponsor" an alien by pledging to provide support to maintain that immigrant at the applicable threshold for the period of enforceability and requiring that sponsors demonstrate the means to maintain an annual income at the applicable threshold. Contemporaneously, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105, restricted most aliens from accessing many public support programs, including Supplemental Security Income ("SSI") and nutrition programs. PRWORA also made the sponsorship requirements in IIRIRA legally enforceable against sponsors.

In light of the 1996 legislative developments, the legacy Immigration and Naturalization Service ("INS") started in 1999 to engage in formal rulemaking to guide immigration officers, aliens, and the public in understanding public charge inadmissibility determinations. *See Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28676 (May 26, 1999) ("1999 NPRM"). No final rule was ever issued, however. Instead, the agency adopted the 1999 NPRM interpretation on an interim basis by publishing *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999) ("Field Guidance"). The Field Guidance dramatically narrowed the public charge inadmissibility ground by defining "public charge" as an alien who is likely to become "primarily dependent on the government for subsistence," and by barring immigration officers from considering any non-cash public benefits, regardless of the value or length of receipt, as part of the public charge inadmissibility determination. *See id.* at 28689. Under that standard, an alien receiving Medicaid (other than for institutionalization for long-term care), food stamps, and public housing, but not cash assistance, would have been treated as no more likely to become a public charge than an alien who was entirely self-sufficient.

The Rule revises this approach and adopts, through notice-and-comment rulemaking, a well-reasoned definition of public charge providing practical guidance to DHS officials making public charge inadmissibility determinations. DHS began by publishing a Notice of Proposed Rulemaking, comprising 182 pages of description, evidence, and analysis. *See Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114 (Oct. 10, 2018) ("NPRM"). The NPRM provided a

60-day public comment period, during which 266,077 comments were received. *See* Rule at 41297. After considering these comments, DHS published the Rule, addressing comments, making several revisions to the proposed rule, and providing over 200 pages of analysis in support of its decision. Among the Rule's major components are provisions defining "public charge" and "public benefit" (which are not defined in the statute), an enumeration of factors to be considered in the totality of the circumstances when making a public charge inadmissibility determination, and a requirement that aliens seeking an extension of stay or a change of status show that they have not received public benefits in excess of the Rule's threshold since obtaining nonimmigrant status. The Rule supersedes the Interim Field Guidance definition of "public charge," establishing a new definition based on a minimum time threshold for the receipt of public benefits. Under this "12/36 standard," a public charge is an alien who receives designated public benefits for more than 12 months in the aggregate within any 36-month period. *Id*. at 41297. Such "public benefits" are extended by the Rule to include many non-cash benefits: with some exceptions, an alien's participation in the Supplemental Nutrition Assistance Program ("SNAP"), Section 8 Housing Programs, Medicaid, and Public Housing may now be considered as part of the public charge inadmissibility determination. *Id*. at 41501-02. The Rule also enumerates a non-exclusive list of factors for assessing whether an alien is likely at any time to become a public charge and explains how DHS officers should apply these factors as part of a totality-of-the-circumstances determination.[1]

STANDARD OF REVIEW

To survive a challenge under Federal Rule of Civil Procedure 12(b)(6), a complaint must have sufficient factual allegations to state a claim that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "facial plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678; *see*

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

also Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004) ("[T]he court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.") (citations and internal quotation marks omitted).

ARGUMENT

I. Plaintiffs Have Not Established Standing Or Ripeness

The Court should dismiss the Complaint, first, because Plaintiffs have not established standing or ripeness. Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "To seek injunctive relief, a plaintiff must show that [it] is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action . . . ; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The "threatened injury must be certainly impending to constitute injury in fact"; allegations of "possible future injury do not satisfy . . . Art. III." *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990). Where, as here, "the plaintiff is not [itself] the object of the government action," standing "is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562.

Here, the Rule governs DHS personnel and certain aliens. It "neither require[s] nor forbid[s] any action on the part of" Plaintiffs. *Summers*, 555 U.S. at 493. In finding that Plaintiffs had established standing to seek preliminary relief, the Court focused on three injuries. The Court first concluded that Plaintiffs adequately pled an injury flowing from alien dis-enrollment from federal health benefits, resulting in increased reliance on State health benefits. PI Order, at 78-79. But this theory is too speculative to support standing. First, there is no indication that Plaintiffs will "certainly" suffer a net increase in health expenditures. In fact, Plaintiffs claimed that "participants do not distinguish between federally and state-funded health and social services" and that the Rule therefore would reduce "utilization of *all services*." PI Mot., ECF No. 17, at 12;

Compl. ¶ 149 (emphasis added). For any Plaintiff to suffer a net-increase in health benefit expenditures (i) a material number of aliens in the State must unnecessarily choose to forgo all federal health benefits (even though there is a Medicaid exception for emergency services); (ii) these aliens must then either apply for, and receive, additional state health benefits, or use emergency room services ultimately financed by the state (again, speculative because of the Medicaid exception for emergency services); and (iii) the increased state expenses for these aliens must be greater than the costs the State would have incurred for aliens who would have resided in the State, and consumed State resources, but for the Rule. In its PI Order, the Court emphasized DHS's concession that a certain number of aliens may dis-enroll from federal health benefits. *See* PI Order at 79. But dis-enrollment, in itself, inflicts no harm on Plaintiffs; again, these aliens must then require health services, and seek assistance from Plaintiffs in particular.

The Court then noted that Plaintiffs will suffer a reduction in Medicaid reimbursements. *See id*. at 79-80. But Plaintiffs do not explain how this would create a harm, given that such a reduction in funding would be commensurate with a reduction in the provision of health services. Indeed, Plaintiffs do not allege—nor did they represent in their preliminary relief papers—that they reap any profit from health services for which they received Medicaid reimbursement payments. Finally, the Court noted that Plaintiffs would suffer operational expenses from administrative adjustments they voluntarily undertake in response to the Rule. *See id*. at 81. But bureaucratic inconvenience occasioned by a change in federal policy cannot confer standing. *See, e.g.*, *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 840 (9th Cir. 2007) (certain injuries are "too trifling . . . to support constitutional standing"); *Crane v. Johnson*, 783 F.3d 244, 253 (5th Cir. 2015) (rejecting government officials' claim that they have standing since DACA would require that them to "alter their current processes to ensure" compliance). If these expenses are sufficient, a State may have standing to challenge *any* federal law by adjusting an administrative program in response to the law. *See Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 272 (4th Cir. 2011) (rejecting standing theory that would have permitted "each state [to] become a roving constitutional watchdog" of the federal government); *Penn. v. N.J.*, 426 U.S. 660, 664 (1976) (rejecting state standing where states could not "demonstrate that the injury . . . was

directly caused by the actions" challenged because "nothing prevent[ed]" states from structuring their laws to prevent the harms).

"Constitutional ripeness," another prerequisite of justiciability, "is often treated under the rubric of standing because 'ripeness coincides squarely with standing's injury in fact prong.'" *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1153 (9th Cir. 2017) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)). "[R]ipeness can be characterized as standing on a timeline," *Thomas*, 220 F.3d at 1138, and ripeness precludes "premature" review where the injury at issue is speculative or may never occur." *ProtectMarriage.com – Yes on 8 v. Bowen*, 752 F.3d 827, 838 (9th Cir. 2014). For the same reasons stated above regarding lack of standing, Plaintiffs' claims fail to demonstrate constitutional ripeness. *See, e.g.*, *Clark v. Seattle*, 899 F.3d 802, 809 (9th Cir. 2018).

Prudential ripeness also counsels against consideration of Plaintiffs' claims. This doctrine "protect[s] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Habeas Corpus Res. Ctr. v. U.S. DOJ*, 816 F.3d 1241, 1252 (9th Cir. 2016). Ripeness is generally lacking where the reviewing court "would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). Here, Plaintiffs' claims are largely premised on speculation about the Rule's operation in practice and its potential future effects. *See, e.g.*, PI Mot. at 16-17, 22 (speculation about impact of the public charge totality of the circumstances test); *id.* at 20-21, 26-27 (speculation about choices to disenroll from public benefits). Thus, "judicial appraisal of these [questions]" should await the "surer footing [of] the context of a specific application of this regulation." *Colwell v. HHS*, 558 F.3d 1112, 1127 (9th Cir. 2009).

II. Plaintiffs Are Outside the Zone Of Interests Regulated By the Rule

Plaintiffs' claims are outside the zone of interests served by the limits of the "public charge" inadmissibility provision in § 1182(a)(4)(A) and related sections. The "zone-of-interests" requirement limits the plaintiffs who "may invoke [a] cause of action" to enforce a particular statutory provision or its limits. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S.

118, 129-30 (2014). Under the APA, a plaintiff falls outside this zone when its "interests are . . . marginally related to or inconsistent with the purposes implicit in the statute," *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987), and "the relevant statute" for this analysis "is the statute whose violation is the gravamen of the complaint." *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 529 (1991).

Plaintiffs fall outside the zone of interests of the public charge inadmissibility statute. At issue in this litigation is whether DHS will deny admission or adjustment of status to certain aliens deemed inadmissible on the public charge ground. It is aliens improperly determined to be inadmissible, not a State that will ultimately suffer downstream harms from adverse inadmissibility decisions, who "fall within the zone of interests protected" by any limitations implicit in § 1182(a)(4)(A) and § 1183, because they are the "reasonable—indeed, predictable—challengers" to DHS's inadmissibility decisions.[2]

In concluding that the Plaintiffs fall within the zone of interests of the INA's public charge inadmissibility provision, the Court stated that this provision intends to protect States since, among other things, States may enforce affidavits of support submitted on behalf of aliens. *See* PI Order, at 69. But a "plaintiff must establish that the *injury* [it] complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision," not just that the plaintiff, as a party, is generally an intended beneficiary of the statutory scheme. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). Here, there is no indication that the public charge inadmissibility provision sought to remedy the alleged, attenuated injury: increased reliance on State services due to a reduction in federal benefit stemming from a broader interpretation of "public charge." Instead, the public charge inadmissibility provision is clearly meant to reduce aliens' reliance on *both* States *and* the federal government.

[2] Plaintiffs' Fifth Amendment claims fail the zone of interests test even more baldly. The Supreme Court has suggested that a heightened zone-of-interests requirement must be met by a plaintiff seeking to enforce the law through an implied cause of action in equity and that the plaintiff must show the provision is intended for his "*especial* benefit." *Clarke*, 479 U.S. at 396 & n.16.

III. The Court Should Dismiss Count One

A. The Rule is Consistent with the Public Charge Inadmissibility Statute

Plaintiffs allege that the Rule's "broad and novel interpretation" of the term "public charge" is contrary to, or inconsistent with, the statutory provision, 8 U.S.C. § 1182(a)(4). Compl. ¶ 312. But as the Ninth Circuit recently held, the Rule's definition of "public charge" is well within the bounds of the statute. *San Francisco*, 944 F.3d at 799 ("We conclude that DHS's interpretation of 'public charge' is a permissible construction of the INA.").

The Ninth Circuit made four principal observations: (1) that the word "opinion" is classic "language of discretion," under which immigration "officials are given broad leeway"; (2) that "public charge" is neither a "term of art" nor "self-defining," and is thus ambiguous under *Chevron* as "capable of a range of meanings"; (3) that Congress set out five factors for consideration but expressly did not limit officials to those factors, which gave officials "considerable discretion"; and (4) that Congress granted DHS the power to adopt regulations, by which "Congress intended that DHS would resolve any ambiguities in the INA." *Id.* at 791-92.

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

There are additional reasons, not expressly relied on by the Ninth Circuit, why the Rule is consistent with the INA. First, Congress expressly instructed that, when making a public charge inadmissibility determination, DHS "shall not consider any benefits the alien may have received," 8 U.S.C. § 1182(s), including various noncash benefits, if the alien "has been battered or subjected to extreme cruelty in the United States by [specified persons]," *id.* § 1641(c); *see also id.* §§ 1611-1613 (specifying the public benefits for which battered aliens and other qualified aliens are eligible). The prohibition on considering a battered alien's receipt of public benefits presupposes that DHS would, ordinarily, consider the past receipt of benefits in making public charge

inadmissibility determinations. *Cf. Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1844 (2018) ("There is no reason to create an exception to a prohibition unless the prohibition would otherwise forbid what the exception allows.").

In addition, Congress mandated that many aliens seeking admission or adjustment of status submit an affidavit of support executed by a sponsor to avoid a public charge inadmissibility determination. *See* 8 U.S.C. § 1182(a)(4)(C) (requiring most family-sponsored immigrants to submit enforceable affidavits of support); § 1182(a)(4)(D) (same for certain employment-based immigrants), § 1183a (affidavit of support requirements). Aliens who fail to submit a required affidavit of support are inadmissible on the public charge ground by operation of law, regardless of their individual circumstances. *Id*. § 1182(a)(4). Congress further specified that the sponsor must agree "to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line," *id*. § 1183a(a)(1)(A), and it granted federal and state governments the right to seek reimbursement from the sponsor for "any means-tested public benefit" that the government provides to the alien during the period of enforceability, *id*. § 1183a(b)(1)(A); *see also id*. § 1183a(a) (affidavits of support are legally binding and enforceable contracts "against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit").

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

B. The Rule Retains the Totality of the Circumstances Standard

Plaintiffs further allege that "Defendants exceeded their statutory authority under the

IIRIRA, making some factors effectively determinative in isolation, contrary to the IIRIRA's clear requirement that multiple factors be considered." Compl. ¶ 313. But the Rule could not be more clear that it retains the "totality of the circumstances" approach under which Executive Branch officials make individualized determinations regarding whether "in the opinion of [the officer] at the time of application for admission or adjustment of status, [the alien] is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). In addition, unlike the 1999 Field Guidance, the Rule clearly and transparently sets out the relevant factors and considerations that DHS will take into account in the totality-of-the-circumstances analysis. By contending otherwise, Plaintiffs disregard the plain text of the Rule.

The Rule, by its terms, "contains a list of negative and positive factors that DHS will consider as part of [the public charge] determination, and directs officers to consider these factors in the totality of the alien's circumstances." Rule at 41295. "The presence of a single positive or negative factor, or heavily weighted negative or positive factor, *will never*, on its own, create a presumption that an applicant is inadmissible . . . or determine the outcome of the . . . inadmissibility determination. Rather, a public charge inadmissibility determination must be based on the totality of the circumstances presented." *Id*. (emphasis added); *see also id*. at 41309 ("DHS has established a systematic approach to implement Congress' totality of the circumstances standard."). In fact, DHS made changes between the NPRM and the final version of the Rule to emphasize that the "totality of the circumstances" approach is retained—for example, by "amend[ing] the definition of 'likely at any time to become a public charge'" by clarifying that this means "more likely than not at any time in the future . . . as determined based on the totality of the alien's circumstances." *Id*. at 41297.

Plaintiffs' allegation that the Rule's "[b]right-line thresholds for income" are contrary to the INA and IIRIRA, Compl. ¶ 115, fail to identify any instance where the totality of the circumstances test has been abandoned. These income thresholds are simply hallmarks for when officials must weigh heavily certain facts about an alien in applying the totality-of-the-circumstances test. Nor is the weighting provided for incomes below or above certain thresholds anything more than "one factor in the totality of the circumstances." *See* Rule at 41446 (positive

factor for high-income aliens is "not a requirement"); *id.* at 41423 (negative income factor "not necessarily determinative . . . in the totality of the circumstances"). The guidance provided by these weightings is entirely consistent with Congress's direction that the Executive Branch "shall, at a minimum, consider the alien's . . . financial status." 8 U.S.C. §1182(a)(4)(B)(i)(IV); *see* Rule at 41309 (the Rule gives "mandatory statutory factors meaning, value, and weight strictly in relationship to . . . whether or not an alien . . . is likely at any time in the future to become a public charge"). Lastly, as this Court held previously, "[t]o the extent plaintiffs challenge the Rule favoring admission of the wealthy over the poor, the plaintiffs' appropriate target is the underlying statute rather than the Rule implementing it." PI Order at 66.

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

Plaintiffs allege that the Rule "essentially" applies a public charge inadmissibility determination to non-immigrant visa holders who are seeking to change their status or extend their stay. Compl. ¶ 315. This claim should be dismissed for two reasons.

First, DHS is *not* imposing a public charge inadmissibility determination on nonimmigrants who seek to extend their visas or change their statuses. *See generally* Rule at 41329. Rather, DHS is setting a new condition for approval of extension of stay and change of status applications and petitions. Although that condition requires such an applicant or petitioner to establish that the nonimmigrant has not received more than 12 months of public benefits within any 36-month period since obtaining the nonimmigrant status, that is manifestly not a public charge inadmissibility determination—which only applies to applicants for visas, admission, and adjustment of status and which imposes other statutory considerations. *See* 8 U.S.C. § 1182(a)(4).[3] In fact, DHS removed a prospective element of the public-benefits condition specifically because such an element "might have been similar to a public charge inadmissibility assessment." Rule at 41329. At bottom, the

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

Rule imposes a condition of approval, not a public charge inadmissibility determination, on nonimmigrant visa holders who seek to change or extend their nonimmigrant status.

Second, DHS has ample statutory authority to impose such conditions. *See* Rule at 41329 (citing 8 U.S.C. §§ 1184, 1258). DHS governs "[t]he admission to the United States of any alien as a nonimmigrant." 8 U.S.C. § 1184(a)(1). But DHS's role does not end upon the nonimmigrant's admission; DHS also governs how long, and under what conditions, the nonimmigrant can stay, *id.*, or change nonimmigrant statuses, *id.* § 1258.[4] And because it is national policy "that aliens *within the Nation's borders* not depend on public resources to meet their needs," *id.* § 1601(2)(A) (emphasis added), it is reasonable and consistent with the statute that DHS require, as a condition of obtaining an extension of stay or change of status, evidence that nonimmigrants inside the United States have remained self-sufficient during their stay.

D. Plaintiffs Fail to State a Claim that the Rule Improperly Reduces the Statutory Role of the Affidavit of Support

Plaintiffs cannot state a claim that the Rule is contrary to IIRIRA based on its treatment of affidavits of support or surety bonds. Plaintiffs allege that the Rule "improperly reduced the significance" of affidavits of support in inadmissibility determinations under IIRIRA "[b]y changing the weight traditionally given to legally enforceable affidavits . . . filed by qualifying sponsors on behalf of intending immigrants." Compl. ¶ 314. Specifically, Plaintiffs contend that under IIRIRA, "immigration officials *must* rely on affidavits of support . . . in deciding whether an individual is inadmissible," and "[f]or decades, DHS considered an affidavit of support as strong evidence that an immigrant will not become primarily dependent on the government." *Id.* ¶¶ 47-48 (emphasis added). Plaintiffs also argue that the Rule improperly limits the use of surety bonds immigrant aliens are permitted to submit if they are found inadmissible on public charge grounds, and substantially increases the minimum bond amount. *Id.* ¶ 90.

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

Plaintiffs' arguments misunderstand the Rule. First, the plain language of the public charge inadmissibility statute demonstrates that there is no requirement for Defendants to consider affidavits of support at all, much less to rely on them in determining inadmissibility. The public charge inadmissibility statute mandates that certain factors be considered, 8 U.S.C. § 1182(a)(4)(B)(i), but merely provides that immigration officials "may also consider an affidavit of support under §1183a," when assessing admissibility, 8 U.S.C. § 1182(a)(4)(B)(ii). This demonstrates that Congress did not intend for a sufficient/properly-filed affidavit of support to be outcome determinative or even to have any particular weight in the totality-of-the-circumstances analysis.[5] DHS explained these conclusions in the Rule. *See* Rule at 41320, 41415-16 (explaining that DHS must, by statute, consider certain specified factors in public charge inadmissibility determinations). Second, the treatment of affidavits of support under the Rule is not a departure from the 1999 Field Guidance, under which an affidavit of support was one factor "taken into account under the totality of the circumstances test." 64 Fed. Reg. at 28690; *see also* 8 C.F.R. § 213a.2(c)(2)(iv) ("an alien may be found to be inadmissible" on public charge grounds "[n]otwithstanding the filing of a sufficient affidavit of support").

Plaintiffs' allegations concerning surety bonds under the Rule also fail to state a claim for violation of IIRIRA. IIRIRA permits an alien "inadmissible under [the public charge inadmissibility statute] . . . if otherwise admissible to be admitted, in the discretion of the Attorney General . . . upon the giving of a suitable and proper bond or undertaking approved by the Attorney General, in such amount and containing such conditions as he may prescribe." 8 U.S.C. § 1183.[6] Because Defendants' authority to permit bonds is entirely discretionary, no limitation on the availability of such bonds or change in the minimum amount of an acceptable bond can

[5] Certain types of immigrants may be inadmissible under the public charge statute unless they obtain a proper affidavit of support. *See* 8 U.S.C. § 1182(a)(4)(C)(ii) & (D). However in these situations, an affidavit of support is the minimum condition to prevent a finding of inadmissibility, not an entitlement to admission.

[6] Under the Homeland Security Act of 2002 the relevant functions of the Attorney General were transferred to the Secretary of Homeland Security. Pub. L. No. 107-296, § 102(a)(3), 116 Stat. 2135 (Nov. 25, 2002) (6 U.S.C. § 112(a)(3)); 6 U.S.C. § 112(e); 8 U.S.C. § 1103(a)(3).

violate IIRIRA. As Plaintiffs acknowledge, the Rule does not preclude the use of surety bonds but rather establishes conditions on them that are well within the discretion of the Defendants. *See* Compl. ¶ 90.

IV. The Court Should Dismiss Count Two

Plaintiffs contend that the Final Rule "conflicts with Section 504 of the Rehabilitation Act of 1973, which prohibits 'any program or activity receiving federal financial assistance' or any 'program or activity conducted by any Executive agency,' from excluding, denying benefits to, or discriminating against persons with disabilities." Compl. ¶ 318. Critically, however, the requirement of § 504 is premised on the denial of services or discrimination "*solely* by reason of . . . disability." 29 U.S.C. § 794(a) (emphasis added). "The causal standard" for such a claim—that a plaintiff "show that [a disabled person] was denied services 'by reason of' her disability"—is a "strict[]" one, *Martin v. California Dep't of Veterans Affairs*, 560 F.3d 1042, 1049 (9th Cir. 2009), and Plaintiffs cannot satisfy it. The fact that a medical condition may constitute one factor to be considered in the totality of the circumstances does not run afoul of § 504.

This Court previously found that Plaintiffs "had not demonstrated even serious question going to the merits" of this Rehabilitation Act claim because a medical condition is merely one non-dispositive factor in the Public Charge totality of the circumstances determination, and the statute requires an alien's health to be considered as part of the determination. PI Order at 50. In its consideration of Defendants' Motion to Stay the Preliminary Injunction, the Ninth Circuit reached the same conclusion. *San Francisco*, 944 F.3d at 799-800 (reversing the Eastern District of Washington's holding that the Final Rule was inconsistent with the Rehabilitation Act). The Court of Appeals concluded that Defendants showed "a strong likelihood that the Final Rule does not violate the Rehabilitation Act." *Id.* at 800. It held first that the INA requires immigration officers to consider aliens' health and "to the extent that inquiry may consider an alien's disability officers have been specifically directed by Congress to do so." *Id.*[7] It then held that "nothing in the

[7] The Court also concluded that the more general requirements of the earlier Rehabilitation Act could not constrain Defendants' effectuation of a "specific charge in subsequent law." *Id.*

Final Rule suggests that aliens will be denied admission or adjustment of status 'solely by reason of her or his disability,'" because the Rule repeatedly "confirms that the public charge determination is a totality-of-the-circumstances test." *Id.*

For the reasons identified by this Court and by the Ninth Circuit, Plaintiffs cannot state a claim that the Rule violates the Rehabilitation Act and that claim must be dismissed.

V. The Court Should Dismiss Count Three

Plaintiffs also contend that the Rule "effectively deprive[s] [states] of their statutory option to extend program eligibility" for "lawfully residing children and pregnant women under Medicaid and CHIP during their first five years in the U.S." and to "make their own eligibility determinations for state public benefits for qualified aliens, nonimmigrants, and aliens paroled into the United States for less than a year." Compl. ¶¶ 232-35. First, the Rule explicitly excludes "CHIP in the definition of public benefit," and "exclude[s] from the public benefits definition, public benefits received by children eligible for acquisition of citizenship, and Medicaid benefits received by aliens under the age of 21 and pregnant women during pregnancy and 60 days following the last day of pregnancy. Rule at 41313-14. Because the Rule does not even permit consideration of these benefits as part of the public charge inadmissibility determination, it cannot possibly deprive the Plaintiffs of their authority to extend the availability of these benefits to any aliens. In any event, the Rule's consideration of the receipt of public benefits, as defined by the Rule, does not limit or prohibit aliens' entitlement to benefits or alter states' authority to determine aliens' eligibility under PRWORA. Rather, the Rule directs immigration authorities to consider whether aliens have used such benefits as part of the totality of the circumstances analysis required by 8 U.S.C. § 1182(a)(4)(B). *See* Rule at 41365-66. Although individual aliens may choose, for a variety of reasons related or unrelated to the Rule, not to access certain benefits to which they are entitled, the Rule does nothing to alter the nature or extent of that entitlement or States' authority to administer those programs, and there is therefore no conflict between the Rule and either statute. Because the Rule's post hoc consideration of the use of benefits cannot change any qualified

alien's[8] legal entitlement to access those benefits or States' authority related to them, Plaintiffs cannot state a claim that the Rule is contrary to CHIPRA or PRWORA.

VI. The Court Should Dismiss Count Four

Claim Four of Plaintiffs' Complaint alleges that the Rule is arbitrary and capricious in violation of the APA for various reasons. *See* Compl. ¶¶ 329-57. Claim Four should be dismissed because none of the theories alleged in the Complaint plausibly suggest the Rule is arbitrary or capricious.

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

Plaintiffs allege that the Rule is arbitrary and capricious because DHS "fail[ed] to provide the necessary 'satisfactory explanation' for their proposed changes to the public charge determination." Compl. ¶ 332. But the "fact that DHS has changed policy does not substantially alter the burden in the challengers' favor." *San Francisco*, 944 F.3d at 801. It is well-settled that there is "no basis in the Administrative Procedure Act . . . for a requirement . . . [of] more searching review" when an agency changes its position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). And there is certainly no basis to find that the agency's prior interpretation in nonbinding guidance could possibly foreclose DHS from adopting a different reasonable interpretation through notice-and-comment rulemaking. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). As the Supreme Court explained in *Fox*, all that DHS was required to do to permissibly change course from the 1999 Field Guidance was to acknowledge that the Rule is adopting a policy change, provide a reasoned explanation for the change, and explain how it believes the new interpretation is reasonable. *See Fox*, 556 U.S. 514-16. The Ninth Circuit ruled that DHS met this standard because it "adequately explained the reasons for the Final Rule[.]" *San Francisco*, 944 F.3d at 805.

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

B. DHS Adequately Considered Potential Harms

Plaintiffs also allege that the Rule is arbitrary and capricious because they claim Defendants "failed to comply with Executive Orders 12866 and 13563, which require agencies to 'assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits.'" Compl. ¶ 334; *see also id.* ¶ 335 (alleging that Defendants failed to assess costs "from increasing the poverty of families and U.S. citizen children"). At the outset, Plaintiffs' claim is precluded because "Executive Orders cannot give rise to a cause of action" under the APA. *Fla. Bankers Ass'n v. U.S. Dep't of Treas.*, 19 F. Supp. 3d 111, 118 n.1 (D.D.C. 2014), vacated on other grounds, 799 F.3d 1065 (D.C. Cir. 2015); *Meyer v. Bush*, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993) ("An Executive Order devoted solely to the internal management of the executive branch—and one which does not create any private rights—is not subject to judicial review.").

DHS, moreover, *did* perform a cost-benefit analysis pursuant to Executive Orders 12866 and 13563. *See* NPRM at 51227-74; Rule at 41485-89. And DHS extensively addressed potential harms in response to public comments. As the Ninth Circuit found, "DHS addressed at length the costs and benefits associated with the Final Rule." *San Francisco*, 944 F.3d at 801; *see also id.* at 803 (discussing DHS's analysis of costs and benefits). The Ninth Circuit noted three points. "First, the costs that the states, localities, and various entities (such as healthcare providers) may suffer are indirect" and the consequence of the "(1) free choice of aliens who wish to avoid any negative repercussions for their immigration status that would result from accepting public benefits, or (2) the mistaken disenrollment of aliens or U.S. citizens who can receive public benefits without any consequences for their residency status." *San Francisco*, 944 F.3d at 803 (explaining that "DHS addressed both groups). Second, DHS acknowledged the potential indirect costs from the Rule. *Id.* (citing Rule at 41486). "It did not attempt to quantify those costs, but it recognized the overall effect of the Final Rule, and that is sufficient." *Id.* And, third, DHS is not tasked with regulation of public benefits; in the Rule, it was "defining a simple statutory term—'public charge'—to determine whether an alien is inadmissible." *Id.* at 803-04. "Even if it could estimate the costs to the states, localities, and healthcare providers, DHS has a mandate from Congress with respect to

admitting aliens to the United States." *Id.* at 804. Accordingly, "it was sufficient—and not arbitrary and capricious—for DHS to consider whether, in the long term, the overall benefits of its policy change will outweigh the costs of retaining the current policy." *Id.*

Lastly, Plaintiffs also allege that "[t]he government departed significantly from its normal procedures in adopting the Public Charge Rule." Compl. ¶ 336. But the Complaint contains no factual allegations of any departures from normal agency procedures, much less from "the kind of 'binding internal policy' that might demand an explanation if departed from." *California v. Trump*, 379 F. Supp. 3d 928, 943 n.8 (N.D. Cal. 2019).

VII. The Court Should Dismiss Counts Five and Six

In their fifth and sixth counts, Plaintiffs allege the Rule violates the Equal Protection component of the Fifth Amendment to the Constitution. Plaintiffs fail to state an equal protection claim because their complaint includes no well-pled allegation that DHS issued the Rule based on any improper discriminatory motive. Plaintiffs do not deny that the Rule is facially neutral, but claim that the Rule violates the equal protection clause because its alleged purpose is to disproportionately affect a particular racial subset of immigrants. *See* Compl. ¶¶ 341, 345. In support, Plaintiffs rely primarily on a handful of stray comments by certain non-DHS, government officials concerning immigration in general, rather than the Rule in particular. Plaintiffs' allegations are insufficient to establish a plausible equal protection claim.

"[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 265. "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). "It implies that the *decisionmaker* . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* (emphasis added). Additionally, strict scrutiny does not apply simply because a plaintiff alleges a disproportionate impact on a particular racial or ethnic group; rational basis applies unless Plaintiffs establish discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 242 (1976)

("Disproportionate impact . . . [s]tanding alone . . . . does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny").

A narrow standard of review here is particularly appropriate because this case implicates the Executive Branch's authority over the admission and exclusion of foreign nationals, "a matter within the core of executive responsibility." *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018); *id*. at 2419 (highly deferential standard is appropriate "[g]iven the authority of the political branches over admission"). Indeed, this "deferential standard of review" applies "across different contexts and constitutional claims" because "'it is not the judicial role in cases of this sort to probe and test the justifications of immigration policies." *Id*. "A conventional application of" this standard, "asking only whether the policy is facially legitimate and bona fide," would plainly require dismissal of Plaintiffs' equal protection claims because Plaintiffs do not contend there is anything facially discriminatory about the Rule. *Id*. at 2420. But dismissal is also appropriate if the Court were to apply rational basis review to Plaintiffs' claim. Under that standard, the Court considers only whether the policy is "plausibly related to the Government's stated objective" and must "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id*. The Complaint contains no allegations suggesting that the Rule is not at least plausibly related to DHS's stated objectives.

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

Additionally, the Rule's construction was guided by an extensive notice-and-comment process, following a NPRM that was just under 200 pages long. *See* NPRM. The Rule included a number of changes from the proposed rule in response to public comments. *See, e.g.*, Rule at 41297. The Rule's procedural history undermines Plaintiffs' conclusory assertion that the Rule's design may somehow be attributed to any alleged improper bias.

Second, to show that DHS issued the rule due to improper motives, Plaintiffs rely almost exclusively on alleged public statements by non-DHS officials that have no express connection to the Rule. The alleged public statements in the Complaint reflect general views on immigration, and say nothing of why any particular official supported the Rule. *See, e.g.*, Compl. ¶¶ 284, 291. Regardless, "contemporary statements" may be relevant to the question of whether an "invidious discriminatory purpose was a motivating factor," if made "by members of the decisionmaking body." *Arlington Heights*, 429 U.S. at 268; *see also Clearwater v. Indep. Sch. Dist. No. 166*, 231 F.3d 1122, 1126 (8th Cir. 2000) ("Evidence demonstrating discriminatory animus in the decisional process needs to be distinguished from stray remarks . . . statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process."). Here, Plaintiffs rely almost exclusively on statements made by non-DHS personnel, and Plaintiffs provide no explanation for how these statements reveal that *DHS* harbored an improper motive in implementing the Rule. Accordingly, Plaintiffs' equal protection claims should be dismissed.[9]

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' complaint.

Dated: April 22, 2020 Respectfully submitted,

[9] Separately, Plaintiffs' sixth count should independently be dismissed because they fail to identify any protected class for this equal protection claim. *See Tierney v. Unknown Dentist*, 596 Fed. Appx. 576, 577 (9th Cir. 2015) ("[plaintiff] has not stated a claim under the Equal Protection Clause because he has not identified a protected class of which he is a member."). For this claim, plaintiffs vaguely assert only that the Rule was "adopted . . . to harm a politically unpopular group." Compl. ¶ 345.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, *et al.* Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	Case No. 19-cv-04975-PJH **[PROPOSED] ORDER DISMISSING THE COMPLAINT**

The Court, having considered Defendants' Motion to Dismiss the Complaint, any opposition thereto, and the entire record, hereby **ORDERS** as follows:

(1) Defendants' Motion is **GRANTED**.

(2) Plaintiffs' Complaint is **DISMISSED** pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: _____

United States District Judge