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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, DISTRICT OF COLUMBIA, STATE OF MAINE, COMMONWEALTH OF PENNSYLVANIA AND STATE OF OREGON, Plaintiffs, **v.** **U.S. DEPARTMENT OF HOMELAND SECURITY, *ET AL.*,** Defendants	Case No. 4:19-cv-04975-PJH **PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS** Date: June 10, 2020 Time: 9:00 a.m. Dept: Courtroom 3, 3rd Floor Judge: Hon. Phyllis Hamilton Trial Date: Not set. Action Filed: August 16, 2019

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INTRODUCTION

Defendants' new Rule, "Inadmissibility on Public Charge Grounds," 84 Fed. Reg. 41,292 (Aug. 14, 2019) (the Rule), dramatically expands the definition of "public charge" and alters the methodology for making public charge determinations in a manner that is contrary to federal law and deliberately targets immigrants of color.

Defendants argue the States lack standing and fall outside the relevant zone of interests. But as this Court and the Ninth Circuit have already concluded, the Rule directly harms the States, which are appropriately positioned to challenge it. The COVID-19 pandemic now gripping the nation underscores the States' position that deterring immigrants from accessing healthcare and other public benefits—essential programs in times such as these—will cause harm by hindering the States' efforts to prevent the spread of infectious disease and to protect the health and well-being of all residents.

Defendants also contend that the States' complaint should be dismissed in its entirety for failure to state legally viable claims. To the contrary, as set forth below, the complaint states well-supported statutory and constitutional claims. Both the Administrative Procedure Act (APA) and the U.S. Constitution limit the government's ability to use immigration law to inflict harm against scapegoated groups. The States' allegations are sufficient to state claims that the Rule is unlawful. The Court should deny the motion to dismiss.

PROCEDURAL BACKGROUND

Relevant factual and legal background is set forth in this Court's order granting a preliminary injunction of the Rule, *see* ECF No. 120 (Oct. 11, 2019) ("PI Order"), and will not be repeated here. The PI Order is stayed pending a review of the merits. *City and Cnty. of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019) ("Stay Order"). The Court granted in part the States' motion to complete the administrative record and to compel discovery, pending resolution of the instant motion, *see* ECF No. 159 (Apr. 1, 2020) ("Discovery Order").

LEGAL STANDARD

A court may grant a Rule 12(b)(1) motion to dismiss only if "the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *In re*

Dynamic Random Access Memory Antitrust Litig. v. Micron Tech., Inc., 546 F.3d 981, 984-85 (9th Cir. 2008). A Rule 12(b)(6) motion to dismiss may be granted only if the complaint fails to state a cognizable legal theory or allege facts sufficient to support a cognizable legal theory. *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1041 (9th Cir. 2010). For either type of motion, the Court "must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[G]eneral factual allegations of injury resulting from the defendants' conduct may suffice, for on a motion to dismiss we presume[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561 (1992) (internal quotation omitted). If the plaintiff alleges "enough facts to state a claim to relief that is plausible on its face," the motion must be denied. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). When standing is challenged, plaintiffs may rely on the allegations in their complaint along with "whatever other evidence they submitted in support of their TRO motion to meet their burden." *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017); *see also McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) (court may review affidavits to resolve factual disputes concerning the existence of jurisdiction).

ARGUMENT

I. THE STATES HAVE ESTABLISHED STANDING TO BRING SUIT

As this Court and the Ninth Circuit have already concluded, the States meet the standing and ripeness requirements of Article III of U.S. Constitution to bring suit in federal court. Standing requires a plaintiff bringing an APA claim to show (1) "injury in fact," (2) a "causal connection" between the injury and the challenged conduct, and (3) that a favorable ruling will "likely" redress the injury. *Lujan*, 504 U.S. at 560-61. The APA provides that a person "adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. There is a "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

As both this Court and the Ninth Circuit have already found, the States face harm as a result of the Rule due to loss of federal funds to support their Medicaid and SNAP programs. Defendants' own analysis shows that disenrollment will reduce yearly federal Medicaid payments to states by over $1.5 billion nationwide. PI Order at 79. The States estimate that $957 could be lows in California alone. *Id*. at 81. In discussing the States' harm, the Ninth Circuit made clear that, even if the exact magnitude was uncertain, it was "significant." 944 F.3d at 807.

Defendants argue that this harm is, nonetheless, too speculative to be judicially cognizable because of the difficulty in predicting the net effect that loss of federal funds will have on State budgets, noting that the States have not alleged that they "reap any profit" from federal reimbursements. Mot. at 6. This argument ignores the States' allegations and evidence that individuals who do not participate in federally funded Medicaid services for which they are eligible will instead receive state-funded care, whether by enrolling in a program funded only by state dollars, or by seeking healthcare in more costly state-supported settings, such as hospital emergency rooms. *E.g.*, Compl. ¶¶ 233, 237-249; Allen Decl. ¶¶ 51, 54; Buhrig I (Medicaid) Decl. ¶¶ 20-21, 23; Cantwell Decl. ¶¶ 24, 40.[1] Both the Ninth Circuit and the Supreme Court have found similar types of harm to be sufficient to establish standing. *See California v. Azar*, 911 F.3d 558, 571 (9th Cir. 2018) (affirming state standing to challenge federal rule that would increase likely increase state healthcare outlays); *Clinton v. New York*, 524 U.S. 417, 430-33 (1998) (New York had standing to challenge veto of legislation that would have permitted the state to keep disputed Medicaid funds). And the Rule's chilling effects are the type of "predictable effect[s] of Government action on the decisions of third parties" that are adequate to establish injury in fact. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019).

As the Court has found, the Rule will cause increased operational costs for other state public benefit programs. PI Order 81-83; *see e.g.*, Fernández Decl. ¶¶ 14, 30; Escudero Decl. ¶¶ 8, 10-11; Buhrig Decl. II (SNAP) ¶¶ 36-37; Palmer Decl. ¶¶ 16, 18; Neville-Morgan Decl. ¶ 22; Gill Decl. ¶¶ 7, 10. Defendants dismiss these operational harms as injuries "too trifling … to

[1] Unless otherwise noted, all citations to declarations refer to affidavits submitted in support of the States' motion for a preliminary injunction, ECF No. 18 (Aug. 26, 2019). *See generally* ECF No. 114, Supp. Br. of Record Citations.

support constitutional standing." Mot. at 6 (quoting *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 840 (9th Cir. 2007)). But these programmatic harms, such as undermining the States' ability to certify schools and districts for school lunch program eligibility, go beyond mere inconvenience and, like increased rates of infectious disease described below, directly impact state responsibilities. *See* PI Order at 82-83. The harms are thus different in kind from the alleged harms in *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 270 (4th Cir. 2011), which bore no direct impact on state operational costs or sovereignty.

In reaching its decision in the PI Order, the Court did not need to address other categories of harm flowing from the Rule that provide additional, independent grounds for the States' standing, such as costs to the States due to higher costs for healthcare delivery systems, *see, e.g.*, Stobo Decl. ¶¶ 19, 27; Coyle Decl. ¶¶ 9-11; Gray Decl. ¶¶ 4-5; Jimenez Decl. ¶ 11; McKeever Decl. ¶¶ 12-14; and Lucia Decl. ¶¶ 26-28, and loss of tax revenues funds due to reduced economic activity. *E.g.*, Lucia Decl. ¶¶ 12-20; Buhrig II Decl. ¶ 35; Fernández Decl. ¶¶ 6, 9, 37; Pakseresht Decl. ¶ 33; Pelotte Decl. ¶¶ 11-12; *see also Doe #1 v. Trump*, 2020 WL 2110978, _ F.3d _ (9th Cir. May 4, 2020) at *6 (noting that exclusion of immigrants results in decrease in overall health of the risk pool and increase in system costs) and *13 (noting immigrant-led households' significant payments of state and local taxes). In particular, decreased enrollment in Medicaid (whether state or federally funded), leads directly to additional costs to the States associated with the need to treat infectious disease and other serious health conditions. *See, e.g.*, Dean Decl. ¶ 8; Hicks Decl. ¶¶ 19(e), 44; Aizuss Decl. ¶¶ 18-20; Gray Decl. ¶¶ 5-6; Ferrer Decl. ¶¶ 5-6, 14-17; Probert Decl. ¶¶ 8, 13; Fanelli Decl. ¶¶ 14, 24, 38. As Dr. Charity Dean, California's Chief Public Health Officer explained, "California's Medicaid program, known as Medi-Cal, is an essential tool for getting uninsured patients, including immigrants, into treatment quickly, limiting both the severity of the patient's illness and the time the patient is infectious in the community." Dean Decl. ¶ 31. If individuals who are suffering from infectious disease delay obtaining proper medical care, they are more likely to spread illness, experience more serious illness, and need intensive care in a hospital—costs that are ultimately born by the States and their constituent elements, as the insurers of last resort. Compl. ¶¶ 245-249; *see Air Alliance Houston*

v. EPA, 906 F.3d 1049, 1059-60 (D.C. Cir. 2018) ("[E]xpenditures to mitigate and recover from harms that could be been prevented […] are precisely the kind of 'pocketbook' injury that is incurred by the state itself"). Moreover, protecting public health is one of the States' core duties, and states have "standing to seek judicial review of governmental action that affects the performance of [their] duties." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950-51 (9th Cir. 2002) (quoting *Wash. Utilities & Transp. Comm'n v. FCC*, 513 F.2d 1142, 1151 (9th Cir. 1975)).

Defendants may attempt to minimize the costs the States have alleged in connection with infectious disease by relying on a recent alert on the U.S. Citizenship and Immigration Services (USCIS) website stating that Department of Homeland Security (DHS) officials conducting public-charge determinations would not "consider testing, treatment, nor preventive care (including vaccines, if a vaccine becomes available) related to COVID-19 as part of a public charge inadmissibility determination." Req. for Jud. Notice, Ex. A. This COVID-19 specific exception underscores that the Rule as written harms public health, and it will not ameliorate the harms that the States have already shown. Treatment of communicable diseases requires trust and cooperation from the States' residents. Ferrer Decl. ¶ 14. "Without clear, official communications from the federal government," "immigrants and their families will likely avoid testing or treatment for dangerous, communicable diseases regardless of the Rule's exceptions." Dean Decl. ¶ 25; *see also* Ferrer Decl. ¶¶ 10-13. The alert is *not* clear; for instance, the third paragraph states that the Rule will still require DHS officials to treat as a negative factor an applicant's receipt of public benefits, including federally funded Medicaid, even when "used to obtain testing or treatment for COVID-19." Req. for Jud. Notice, Ex. A. Further, an exception for healthcare "related to COVID-19" is impossible because Medicaid does not provide coverage malady-by-malady; enrollees receive *all* covered services. Eligible individuals will be unable to distinguish between benefits that are exempted and those that could carry negative repercussions for their future immigration status. Cantwell Decl. ¶¶ 19-20. And to promote public health most effectively, people should enroll and receive Medicaid preventive services in advance, not wait for emergent crises. *Id.* ¶ 39.

Because the States are suffering harm as a result of the Rule, the case is constitutionally ripe for review. The States' injuries are not "speculative" or unlikely to occur. Nor should this case be dismissed on prudential ripeness grounds in order to allow "further factual development," as Defendants contend. Mot. at 7. The Rule is final, and it unquestionably represents a sea change in how immigration officials consider the receipt of federally funded public benefits. *Cf. Habeas Corpus Res. Ctr. v. U.S. DOJ*, 816 F.3d 1241, 1249-52 (9th Cir. 2016) (rejecting request for pre-enforcement review as unripe due to ambiguity and uncertainty regarding the agency's implementation of new rule). The States presented evidence that chilling effects had already begun prior to implementation of the Rule and that additional harm is imminent. That is adequate to support a suit under Article III. *See E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1266-67 (9th Cir. 2020) (plaintiffs are "not required to demonstrate some threshold magnitude of their injuries"). Requiring the States to come back to court only after retrospective evidence of the Rule's impact becomes available would allow harms to compound.

II. THE STATES ARE WITHIN THE ZONE OF INTERESTS

Zone of interest analysis asks whether "a particular plaintiff should be heard to complain of a particular agency decision." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). As this Court concluded, the "State plaintiffs' interests are squarely within the challenged statute's zone of interests." PI Order at 69. Defendants assert that only individuals wrongfully determined to be a public charge fall within the zone of interests of the INA, *see* Mot. at 8, but the zone of interests test is not so restrictive. Where a plaintiff is not itself the subject of the contested regulatory action, "the test denies the right of review" only "if the plaintiff's 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." PI Order at 67 (quoting *Clarke*, 479 U.S. at 399-400). The test is "not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Id.* (citing *Clarke*, 479 U.S. at 399-400). Courts are not to "ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff[,]" but instead to "first discern the interests arguably ... to be protected by the statutory provision at issue," and then "inquire whether the

plaintiff's interests affected by the agency action in question are among them." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998); *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) ("We do not require any indication of congressional purpose to benefit" plaintiff and "the benefit of any doubt goes to the plaintiff").[2]

The States readily satisfy this "lenient" standard, *Sierra Club v. Trump*, 929 F.3d 670, 703 n.26 (9th Cir. 2019); indeed, there is strong evidence that Congress *did* intend to protect their interests in the relevant statutes. First, as this Court concluded, "Congress clearly intended to protect states" because the INA's affidavit of support provision permits states to enforce those agreements. PI Order at 70 (citing 8 U.S.C. § 1183a). Congress also intended to protect states' coffers when it enacted the public charge provision, which allows immigration officials to consider affidavits of support. *Id.* at 68, 70 (citing 8 U.S.C. § 1182(a)(4)).

Second, the States' interests are more than arguably protected because the States administer public benefits considered in the public charge assessment. As described in greater detail in Section V below, Congress expressly gave the States discretion to decide whether to provide many public benefits to noncitizens. *See, e.g.,* 8 U.S.C. §§ 1621(b), (d), 1622(a); *see also* PI Order at 70 (stating that Congress in 8 U.S.C. § 1183a "recognize[d] that states […] would be paying means-tested public benefits to those subject to a public charge analysis"). The statutory scheme as a whole therefore accounts for the States' interest in allocation of public benefits to noncitizen residents. *See E. Bay Sanctuary Covenant*, 950 F.3d at 1270 (court "may consider any provision that helps us to understand Congress' overall purposes in enacting the statute"). Defendants intentionally disrupt this balance by punishing individuals for receiving federal benefits (and chilling them from participation in state-funded public benefits programs), leaving States to fill the void through more costly emergency care. *See* Section I, *supra*. The States are

[2] The cases that Defendants cite to support their argument, *see Mot. 8 (citing Air Courier Conf. of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517 (1991), and *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990)), apply the standard that the U.S. Supreme Court expressly rejected in *Clarke, Patchak* and *NCUA*. *See Air Courier*, 498 U.S. at 524-26 ("We must inquire [whether the legislation was] intended for the benefit of postal workers"); *Lujan*, 497 U.S. at 883 (rejecting standing where statute "obviously" enacted to protect parties to proceedings and not reporters).

therefore "reasonable—indeed predictable—challengers" of Defendants' actions penalizing noncitizens for availing themselves of such benefits. *Patchak*, 526 U.S. at 227.

Defendants conflate their merits argument with the zone of interests analysis when contending that the "public charge inadmissibility provision is clearly meant to reduce aliens' reliance on *both* States *and* the federal government." Mot. at 8. But this reading of the INA assumes Defendants' views on the merits of the suit. Changes to the way the statute operates—by shifting burdens to the States—brings States squarely within the zone of interests that the statute was designed to address. As the States explain below, the public charge provision has never been interpreted to penalize the receipt of supplemental government benefits designed to promote health or upward mobility. DHS disagrees with this longstanding interpretation, but the States should not be prevented from bringing suit to challenge the Rule on that basis. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 155-56 (1970) (whether Congress had in fact prohibited the competition plaintiffs sought to challenge was a merits question not considered in the zone of interests test). In a two-sentence footnote, Defendants argue that the States' equal protection claims fail the zone of interests test. Mot. at 8, n.4. However, it is "doubtful that any zone of interests test applies" to constitutional claims, particularly after the Supreme Court's decision in *Lexmark*, which "clarified […] that the test applies to all statutorily created causes of action." *Sierra Club*, 929 F.3d at 700-02 (citing *Lexmark Int'l, Inc. v. Static Control Comp., Inc.*, 572 U.S. 118, 127 (2014) (internal quotations omitted)).[3] Moreover, even if a zone of interests test applies after *Lexmark*, it does not require that the constitutional provision be intended for the States' "especial benefit."[4] *See Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1352 (Fed.

[3] Prior to *Lexmark*, the only constitutional provision to which the courts applied the zone of interests test with any regularity is the Dormant Commerce Clause. *See, e.g., Individuals for Responsible Gov't, Inc. v. Washoe Cnty.*, 110 F.3d 699, 703 (9th Cir. 1997). And a post-*Lexmark* Supreme Court decision on the Dormant Commerce Clause did not even mention zone of interests. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

[4] Further, the passage in *Clarke* that Defendants rely upon concerned an earlier Supreme Court decision, *see* 479 U.S. at 400 n.16 (discussing *Cort v. Ash*, 422 U.S. 66, 78 (1975)), that considered whether to imply "a private cause of action for damages." *Cort*, 422 U.S. at 68. As *Clarke* notes, the zone-of-interests test "is not a test of universal application." 479 U.S. at 400 n.16. There is no reason to think that the Court's hesitancy to recognize private damages claims would extend to claims for purely injunctive relief, particularly when brought by a State.

Cir. 2010) (distributor's claim was within zone of interests of the Equal Protection Clause based on its purchasers' interests in being free from sex discrimination).

III. THE STATES HAVE ADEQUATELY PLEADED THAT THE RULE IS CONTRARY TO THE INA IN COUNT ONE

The first claim adequately pleads a cause of action under the APA, challenging the public charge rule as unlawful under the INA. Defendants contend that this count should be dismissed, pointing to the Ninth Circuit's stay order concluding that the States had not demonstrated a likelihood of success on the merits. The Stay Order issued by a divided Ninth Circuit motions panel does not warrant dismissal of the claims at issue at this time. The stay was issued without oral argument, on an abbreviated timeline, with limited briefing, and without the benefit of a complete record. As the Ninth Circuit has recently clarified, the predictive analysis of a motions panel when considering an emergency motion for a stay "should not, and does not, forever bind the merits of the parties' claims." *E. Bay Sanctuary Covenant*, 950 F.3d at 1264. Moreover, while an appeal from preliminary injunction order is pending, the Court retains jurisdiction to continue with other stages of the case, and the Ninth Circuit has "admonished district courts not to delay trial preparation to await an interim ruling on a preliminary injunction." *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018).

The Stay Order does not warrant dismissal. The States allege that the Rule's "broad and novel" interpretation of "public charge" is contrary to the meaning of the statutory term. Compl. ¶ 312. As this Court concluded, the States have raised at least serious questions that "the statute, read in context, unambiguously forecloses … DHS's expansive interpretation of the term [public charge]." PI Order at 48. While the motions panel concluded that the term may not have a "fixed, unambiguous meaning," 944 F.3d at 796, its historical analysis nonetheless confirmed that the term "public charge" has never been interpreted to permit a finding of inadmissibility based solely on the receipt of temporary, supplemental assistance, which the Rule purports to permit. PI Ord. 40-49. When the history of the term is fully considered, as this Court's preliminary injunction order did, it is clear that Congress' use of the term "public charge" is properly interpreted to bar the construction set out in the Rule. *See Whitman v. Am. Trucking Assoc.*, 531

U.S. 457, 471 (2001) (finding a particular construction "unambiguously bar[red]" when "interpreted in its statutory and historical context").

Furthermore, the motions panel improperly conducted its *Chevron* step two analysis, where this Court determined that the Rule's new interpretation likely is "substantially outside the bounds of a reasonable interpretation." PI Order at 48 (applying *Chevron v. U.S.A, Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The Stay Order failed to address the core interpretative question of whether it is reasonable for DHS to redefine "public charge" to mean an immigrant who receives certain supplemental, temporary public benefits for several months in any three-year period (it is not). PI Ord. 53-54. Further, the panel erroneously concluded that it is reasonable for the Rule to allow consideration of supplemental, non-cash benefits, even though it would result in individuals being deemed a public charge based on "an average of less than 17 cents a day" of nutritional assistance over three years. PI Ord. 44, 46-47. Defendants may not "pour any meaning into the term" public charge. PI Ord. 38-39. By defining "public charge" to include immigrants likely to receive Medicaid or food stamp benefits for as little as six months, DHS has unreasonably defined the phrase to cover those prospective immigrants who would rely primarily on their own wages to support themselves.

Defendants raise two additional arguments not adopted by the Ninth Circuit. Neither is persuasive.

First, Defendants point to statutory provisions that instruct the agency not to consider "any benefits" received by an immigrant who has been "battered or subjected to extreme cruelty" when making a public charge assessment. 8 U.S.C. § 1641(c); *see also* §§ 1611-13 (listing a broad range of public benefits for which battered immigrants are eligible). DHS contends that this provision "presupposes that DHS would, ordinarily, consider the past receipt of benefits in making public-charge inadmissibility determinations." Mot. at 9-10. But the battered immigrant provisions refer broadly to "benefits" and do not single out particular supplemental benefits, and thus fails to imply, much less prove, that Congress intended to alter the definition of public charge. Nor do the statutes in any way purport to redefine the term public charge in the INA to mean the receipt of non-cash benefits for a period of months, as in the Rule. Congress simply

spoke broadly to provide assurance to vulnerable immigrants who are victims of interpersonal violence, and exempt from public charge admissibility assessments. 8 U.S.C. § 1182(a)(4)(E).

Second, Defendants also assert that the INA's affidavit of support provision (applicable only to some immigrants) reveals Congress's intent that non-cash benefits should be part of the public charge assessment for all immigrants because those agreements obligate sponsors to reimburse the government for "any means-tested public benefit." Mot. at 10 (quoting 8 U.S.C. § 1183a(b)(1)(A)). As this Court has observed, however, this provision does not define or list the means-tested benefits to which it applies. PI Order at 41 n.14.[5] Moreover, by contemplating a way for the government to recoup the value of public benefits accessed by immigrants, Congress confirmed that some immigrants would be expected to access public benefits after admission. Affidavits of support merely oblige sponsors to follow through on their promises to support their family members. The statute establishes that an affidavit of support is relevant to the *method* of determining who is likely to become a public charge in the United States. 8 U.S.C. § 1182(a)(4)(B)(ii). But by making the affidavits legally enforceable, Congress did not indirectly change the settled meaning of "public charge." 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." *Am. Trucking Ass'ns*, 531 U.S. at 468.

The States' claim that the Rule makes "some factors effectively determinative," Compl. ¶ 313, sufficiently states a claim for violation of the INA's requirement that the agency make a public charge determination based on the five-factored "totality of the circumstances" test, 8 U.S.C. § 1182(a)(4)(B)(i). Defendant contends that the Rule maintains a "totality of circumstances" test because the phrase appears in its Rule. Mot. at 10-12. But while the Rule uses the phrase "totality of the circumstances," that does not mean that the Rule is facially consistent with federal law, nor does it foreclose a later as-applied challenge based on the complete administrative record. The Rule's many new, negative weights connected to "assets, resources, and financial status" make the fourth of five statutorily mandated factors potentially

[5] Although 8 U.S.C. § 1183a(a)(1)(B) states that subsection (e) defines "any means-tested public benefit," that subsection does not define the term.

determinative. A working individual whose family of four's income is $32,000 per year would receive an automatic negative factor based on having an income below 125% of the federal poverty level. 8 C.F.R. 212.22(a)(4)(A), 84 Fed. Reg. 41,447. Such a person would, again based only on their income, be unable to prove that they would be ineligible for Medicaid (which, in California, is available to all working adults up to 138% of the poverty level, *see* 22 C.F.R. 212.22(a)(4)(ii)(E)(3)), and that individual's application for legal permanent residency itself is an automatic negative factor in the agency's consideration of the totality of the circumstances under the Rule, according to recent USCIS guidance. *See* Req. for Jud. Notice, Ex. B (stating that "[s]eeking adjustment of status as a lawful permanent resident" is a negative factor unless the applicant submits "evidence of ineligibility for public benefits"); *see also supra* pp. 13, 20. The States have plausibly alleged that the Rule is inconsistent with the INA's requirement that immigration officials consider all five-factors. *See Doe #1,* 2020 WL 2110978, _ F.3d _ at *10 (noting that the public charge statute requires that *all* of the specified factors be considered); *Martinez-Farias v. Holder*, 338 F. App'x 729, 730-731 (9th Cir. 2009) (finding that the "existence or absence of a particular factor should never be the sole criteria" for determining if an alien is likely to become a public charge) (citing 8 C.F.R. § 245a.3(g)(4)(i)).

The States agree that the Complaint does not state a contrary to law claim based on either the affidavit of support changes or the application of the Rule to nonimmigrants *per se*. (Mot. at 12-15.) Those allegations bolster the States' claim that the Rule's broad scope runs counter to Congressional intent, as demonstrated, in part, by longstanding agency practice. For decades, affidavits of support have been considered "as strong evidence that an immigrant will not become primarily dependent on the government," offering a "well established, straightforward and efficient process" for public charge determinations. Compl. ¶ 48, 118. The Rule's escalation of the minimum cost of a surety bond, from $1,000 to $8,100, and placing the bond off limits for applicants who have one or more heavily weighted factors, Compl. ¶ 90, will magnify the Rule's impact on family immigration, and disproportionately impact lower-wage immigrants who nonetheless primarily rely on their income for subsistence. And the Rule's confirmed application to nonimmigrants seeking visa extensions or to change their status further expands the scope of

individuals within the United States, such as international students, who are likely to be subject to the Rule's chilling effects.

IV. THE STATES HAVE ADEQUATELY PLEADED IN COUNT TWO THAT THE RULE VIOLATES SECTION 504 OF THE REHABILITATION ACT

The States have alleged a cognizable legal theory in their claim that the Rule is contrary to Section 504 of the Rehabilitation Act. *See* 29 U.S.C. § 794(a); Compl. ¶¶ 109-10, 317-21. In addition to prohibiting disparate treatment based on disability, Section 504 "require[s] reasonable modifications [to programs] necessary to correct for instances in which qualified disabled people are prevented from enjoying meaningful access to a benefit because of their disability."[6] *Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008). Policies that apply to all applicants regardless of disability nonetheless may discriminate when they "deny disabled persons public services disproportionately due to their disability." *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996); *see also McGary, v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004) (allegations that city's refusal to extend time to comply with local ordinance "burdened [plaintiff] in a manner different from and greater than it burdened non-disabled residents, solely as a result of his disabling condition," stated a claim). DHS concedes that the Rule will have a "potentially outsized impact . . . on individuals with disabilities," *see* 84 Fed. Reg. at 41,368; 41,410, and never addresses what accommodations will be available to meet its obligations under Section 504.

Congress did not exempt DHS from Section 504 when it included the "health" factor in the INA. Section 504's specific prohibition of disability discrimination is far more targeted than the INA's generalized instruction to consider "health." DHS, in particular, is prohibited from denying access to benefits and services on the basis of disability, *see* 6 C.F.R. § 15.30(b)(1), and from using discriminatory criteria or methods of administration. *Id.* § 15.30(b)(4). Although DHS had been permitted prior to the Rehabilitation Act and the Americans with Disabilities Act to consider an applicant's disability without regard to whether its effects could be eliminated or reduced by reasonable accommodations, Congress repudiated that approach by enacting these

[6] Section 504 also requires that an individual be otherwise qualified "with or without reasonable accommodation." *Mustafa v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1175 (9th Cir. 1998).

disability rights statutes. *See* Compl. ¶ 122; *Corley v. United States*, 556 U.S. 303, 316 (2009) ("a more specific statute will be given precedence over a more general one").

Defendants' conclusory statements that disability will not be dispositive cannot be reconciled with the substance of the Rule. For example, the Rule "*redefines* the term 'public charge' to mean an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period." 84 Fed. Reg. at 41,295 (emphasis added); Mot. at 4. Under the Rule, receipt of Medicaid for more than 12 months is not simply one factor in the totality of the circumstances test; it is the definition of a public charge. As DHS acknowledges, "Medicaid is often the only program available to and appropriate for people with disabilities," because private insurance does not cover many services essential to certain individuals with disabilities. *See* 84 Fed. Reg. at 41,367; Compl. ¶ 51. The Rule would deny such individuals meaningful access to immigration benefits because of their disability-related needs. *See Rodde v. Bonta*, 357 F.3d 988, 998 (9th Cir. 2004) (hospital closure "would deny certain disabled individuals meaningful access […] because of their unique needs" for Medicaid services).

Because DHS adopted a definition of "health" that largely overlaps with the statutory definition of disability, the Rule automatically assigns this negative factor to persons with disabilities, regardless of whether their limitations can be eliminated or reduced by reasonable accommodations. *Compare* 8 C.F.R. § 212.22(b)(2)(i) *with* 29 U.S.C. § 705(9)(B), *and* 42 U.S.C. §§ 12102(1), (2). Further, because the Rule's overlapping negative factors will count applicants' disabilities against them multiple times (and exclude them from positive factors), the Rule effectively will exclude individuals because of their disabilities, even if they could be reasonably accommodated. *See* 8 C.F.R. §§ 212.22(b)(4)(i)(E), (c)(1)(ii) (Medicaid); 212.22(b)(4)(i)(C), (b)(4)(ii)(H), (c)(1)(iii) (lack of private insurance); 212.22(c)(2)(iii) (private health insurance). Compl. ¶¶ 122-25. DHS "appear[s] to have forgotten the established § 504 'reasonable accommodation' and 'meaningful access' requirements." *Mark H.*, 513 F.3d at 938.

V. THE STATES HAVE ADEQUATELY PLEADED IN COUNT THREE THAT THE RULE IS CONTRARY TO CONGRESS' GRANT OF DISCRETION TO STATES OVER HEALTHCARE PROGRAMS

Defendants' motion to dismiss the third claim, that the Rule is contrary to the grants of discretion that Congress expressly gave to the States to determine eligibility for public benefit programs, mischaracterizes the States' allegations. The States do not allege that the Rule has altered the eligibility criteria for federal, state, or local benefit programs. However, the States do allege that because of known and predictable chilling effects (which Defendants have grossly understated, *see* Compl. ¶¶ 145-46), the Rule will "effectively deprive Plaintiffs of their statutory option" to extend program eligibility to certain groups. Compl. ¶¶ 324, 326.

Only a relatively narrow proportion of immigrants are *both* subject to a public charge admissibility determination *and* eligible for federally-funded Medicaid, but this group faces particularly harsh choices under the Rule. For example, several of the States have elected the option to automatically certify Medicaid enrollees for up to 12 months at a time, in order to increase access to preventive care, support the development of patient-provider relationships, and reduce state administrative burdens. Compl. ¶¶ 52-53. But enrollment in Medicaid for twelve months (regardless of the amount of medical services actually used), is the new definition of what it means to be a "public charge," *and* becomes a heavily weighted factor in the new purported totality of the circumstances test. 84 Fed. Reg. at 41,501; 8 C.F.R. § 212.21(a). Prospective negative immigration repercussions are highly consequential facts that will reasonably lead eligible individuals to avoid enrollment.

With respect to programs that the Rule excludes from consideration, such as state-funded healthcare programs and CHIP and Medicaid for children under twenty-one, or for individuals not subject to the Rule, such as refugees and asylees, the States have alleged that chilling effects will result in significant reductions in enrollment. Compl. ¶¶ 146, 149. In California alone, the States have alleged that the Rule will cause the likely disenrollment of more than 40,000 children with at least one potentially life-threatening condition. Compl. ¶ 153. Indeed, it was the serious consequences for individuals formally exempted by prior immigration and welfare reform efforts

that caused DHS' predecessor agency, after consultation with agencies like HHS that administer public benefits, to issue guidance regarding the limited scope of public charge. Compl. ¶ 46.

In PRWORA, Congress expressly gave the States—not immigration officials—discretion to decide whether to provide many public benefits to noncitizens. *See* 8 U.S.C. §§ 1621(b), 1621(d), 1622(a). Nor was PRWORA Congress' final word on this subject: a number of its restrictions were later reversed, and access to other programs was broadened. *See, e.g.*, Agricultural Research, Extension, and Education Reform Act of 1998, Pub. L. No. 105-185, §§ 503-04, 112 Stat. 523, 578-79; Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 4401, 116 Stat. 134, 333-34; Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, § 214, 123 Stat. 8, 56-57; Affordable Care Act, 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII), 26 U.S.C. § 36B(c)(1)(B)(ii). The plaintiff States have relied upon this authority to create robust safety net systems that include immigrant residents, Compl. ¶ 50, minimizing costs for which the States would otherwise be responsible under the Emergency Medical Treatment and Labor Act. Compl. ¶¶ 238-241, 245. The Rule carries far reaching consequences for the States' administration of those programs. Compl. ¶¶ 173-89. The Rule's interference with the States' ability to administer the very benefits that Congress authorized them to offer demonstrates that the Rule will "frustrate the policy that Congress sought to implement." *See Secs. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 468 U.S. 137, 143 (1984); *see also Akhtar v. Burzynski*, 384 F.3d 1193, 1202 (9th Cir. 2004) (holding INS's statutory interpretation unreasonable as "contrary to congressional intent and frustrat[ing] congressional policy").

The States have adequately pleaded that the Rule undermines their administration of lawful public benefit programs, contravening the discretion that Congress gave to the States.

VI. THE STATES HAVE ADEQUATELY PLEADED COUNT FOUR THAT THE RULE IS ARBITRARY AND CAPRICIOUS

The States have alleged that DHS failed to meet the minimum standards for reasoned agency decision-making. This Court held that Plaintiffs are likely to succeed on their claim that DHS acted arbitrarily and capriciously in two respects, demonstrating that the underlying allegations more than plausibly state a claim. First, DHS failed to adequately consider significant

costs to state and local governments. PI Ord. 53-59; Compl. ¶ 233-49, 335. Although a Ninth Circuit motions panel observed in its preliminary assessment that DHS "addressed at length the costs and benefits associated with the Rule," the APA requires that DHS do more than identify significant comments. DHS must "reasonably reflect upon the information contained in the record and grapple with contrary evidence," which it failed to do. *See Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017); *see also Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."). Nor may an agency decline to engage with evidence of likely costs by dismissing those costs as necessary to advance their desired policy goal. *See Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1068-69 (9th Cir. 2018) (agency's failure to explain rejection of available contrary data was arbitrary and capricious).

Second, DHS failed to consider public health consequences and failed to adequately explain why it rejected prior agency conclusions regarding those consequences. PI Ord. at 59-63; Compl. ¶¶ 136-37. Contrary to Defendants' assertions, *see* Mot. at 18, the APA requires an agency to do more than acknowledge that its regulations will carry consequences. It requires adequate reasons for agency decisions, including a more detailed justification when a prior policy engendered serious reliance interests, or a new policy rests upon factual findings that contradict those underlying a prior policy, as here.[7] *See FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).[8]

The allegations on which this Court found a likelihood of success on the merits, PI Order at 53-63, are far from the complete scope of the States' plausible claims of arbitrary rulemaking. For example, DHS's stated justifications for the Rule—reducing incentives to immigrate and promoting self-sufficiency—fail to provide a "satisfactory explanation for its action including a

[7] The interagency communications this Court ordered to be included in the administrative record may provide information that should be considered prior to resolution of this fact-dependent claim. *See* Discovery Order at 20. *See also* Compl. ¶ 141.

[8] Defendants' reliance on *Brand X* is misplaced. That case did not address a prior agency policy that engendered serious reliance interests or a new policy that rested on contradictory factual findings. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005). In fact, *Brand X* acknowledged that "inconsistency with past practice" may be "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Id.*

rational connection between the facts found and the choice made." *Encino*, 136 S. Ct. at 2125; Compl. ¶ 308. This is because those directly subject to a public charge determination, including immigrants adjusting to LPR status and those seeking to extend or change visa categories, are largely ineligible for the newly included federal benefits, and remain barred once admitted into lawful status for an additional five-year waiting period. *See* 84 Fed. Reg. at 41,313; Compl. ¶¶ 39, 128-29. In addition, DHS attempted to justify the Rule by citing expenditure data for immigrant participation in federal nutrition, housing, and health care programs. 83 Fed. Reg. at 51160. But these data do not provide a "good reason" for a policy change because Congress authorized immigrants' participation in these programs. *See Fox*, 556 U.S. at 515; Comp. ¶¶ 1, 43, 126, 130. The data merely show immigrants' participation as Congress intended when it enacted an eligibility framework striking a balance between supplemental support and self-reliance.

The Rule also irrationally undermines DHS's stated goal to promote self-sufficiency by discouraging participation in public benefits programs that enable self-reliance, as demonstrated by ample evidence in the administrative record that DHS disregarded. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008) (agency cannot "put a thumb on the scale by undervaluing the benefits and overvaluing the costs" of policy alternatives); *Zinke*, 900 F.3d at 1068-69 (failure to explain rejection of available contrary data was arbitrary and capricious); Compl. ¶ 120. The Rule creates particularly steep new barriers for immigrant students, notwithstanding that these individuals' ability to support themselves is on an upward trajectory. Compl. ¶ 268. Yet the agency's reasoning repeatedly emphasizes the Rule's exceptions and reiterates the Rule's stated purpose without citing supportive evidence (or engaging with contrary evidence) that the newly-included factors reliably predict immigrants' future self-sufficiency. *See, e.g*, Fed. Reg. at 41381 (justifying inclusion of Medicaid "because a person […] who uses government assistance to fulfill these [basic living] needs frequently will be dependent on such assistance to such an extent that the person is not self-sufficient"). This is a tautology, not reasoned decision-making.

Further, the Rule will primarily impact individuals adjusting status or changing their visa conditions who are already living in the United States, and thus the purpose to "minimize the incentive of aliens to immigrate" is inapposite. Compl. ¶¶ 128-29, 305. The Rule is a particularly irrational means to disincentivize immigration when compared to its much broader chilling effect, which as DHS acknowledged, will impact numerous children, including citizens in mixed-status households. 84 Fed. Reg. at 41,300, 41,463; 83 Fed. Reg. at 51,270; Compl. ¶ 137. DHS justified the Rule by characterizing immigrants' decisions to disenroll from public benefits as "unwarranted." 84 Fed. Reg. at 41,313; Compl. ¶ 207. But predictable public reactions to a federal rule—even if based on incorrect assumptions—cannot simply be dismissed. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (affirming harms based on predictable effect of government action on decisions of third parties); *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) ("[w]hether the public has been irrational in interpreting" agency action is irrelevant to standing). As this court previously found, DHS "abdicat[ed] … responsibility to consider" chilling effects on individuals not covered by the Rule, who nonetheless will withdraw from public benefits.

DHS also fails to explain its decision that it "generally will not favorably exercise discretion to allow submission of a public charge bond" if a noncitizen has at least one heavily weighted negative factor. 8 C.F.R. § 213.1(b); Compl. ¶¶ 90, 117. In other words, anyone who has received a federal benefit enumerated in the Rule almost always will be foreclosed from overcoming a public charge determination by securing a bond. Instead of providing a reasoned explanation for this restriction on the statutorily authorized bond mechanism, *see* 8 U.S.C. § 1183, DHS simply asserts that it has congressional authority to consider whether to offer a public charge bond. 84 Fed. Reg. at 41,292, 41,451. But DHS's bald claim to authority does not provide any reasoning, let alone "adequate reasons for its decisions."[9] *See Encino*, 136 S. Ct. at 2125.

[9] Nor should Defendants be heard to argue that this aspect of the Rule is not a change from prior agency policy. This aspect of the Rule imposes a restriction on immigration officers' discretion to make public charge bonds available, *beyond* the statutory totality of the circumstances test. 84 Fed. Reg. at 41,450.

The Rule's introduction of three heavily weighted negative factors skews the totality of the circumstances test toward bright line standards without an adequately reasoned justification. *See* 8 C.F.R. § 212.22(c)(1). These heavily weighted negative factors are not independent variables, but significantly overlap with non-weighted negative factors, and are compounded by disqualification from corresponding heavily weighted positive factors. For example, the Rule applies a heavily weighted negative factor if an applicant "has been diagnosed with a medical condition that is likely to require extensive medical treatment . . . or that will interfere with the alien's ability to provide for himself or herself, attend school, or work" and lacks private health insurance or significant assets. *Id.* § 212.22(c)(1)(iii). Applicants in these circumstances are also subject to two non-weighted negative factors based on the same medical condition, *id.* § 212.22(b)(2), and insufficient assets to cover reasonably foreseeable medical costs, *id.* § 212.22(b)(4)(i)(C); and deprived of the heavily weighted positive factor of private health insurance, *id.* § 212.22(c)(2)(iii). In practice, it would be nearly impossible for an applicant to overcome this heavily weighted negative factor (and others), even if the applicant's sponsor submits an enforceable affidavit of support, previously acceptable as strong evidence in a public charge determination. *See* 8 U.S.C. §§ 1182(a)(4)(B)(ii); 1183a(a)(1)(A); 22 C.F.R. § 40.41 (2018); H.R. Rep. No. 104-651, at 1451 (1996) (noting State Department and Immigration and Naturalization treatment of affidavits of support); Compl. ¶¶ 48, 118.

Instead of acknowledging and explaining this policy change, DHS simply insists that no single heavily weighted negative factor can lead to a determination that an individual is inadmissible on public charge grounds. 84 Fed. Reg. at 41,397; 41,419; 41,426; 41,435; 41,504; 8 C.F.R. § 212.22(c). But the States have alleged that some of the negative factors are "effectively determinative in isolation" because of the significant overlap between weighted and non-weighted factors. Compl. ¶ 313. An examination of the complete administrative record is needed in order to determine whether Defendants' claim that the Rule will be a true multi-factor test that eschews bright line standards, as the INA requires, is valid. *Cf. Sea Robin Pipeline Co. v. F.E.R.C.*, 127 F.3d 365, 369-71 (5th Cir. 1997) (agency overreliance on three non-physical factors "missed the basic thrust" toward physical and operational factors and "revert[ed] to its

single factor, bright-line" test in violation of the APA). Moreover, DHS has not offered a reasoned explanation for this departure from the INA's mandate to apply a totality of the circumstances test, or grappled with the impact of substantially deemphasizing the evidentiary value of the affidavit of support. *See* 84 Fed. Reg. 41,439.

Therefore, the States have plausibly alleged that DHS has failed to meet the APA's requirements for reasoned agency decision-making.

VII. THE STATES HAVE ADEQUATELY PLEADED EQUAL PROTECTION VIOLATIONS IN COUNTS FIVE AND SIX

To prevail on an equal protection claim under *Arlington Heights*, a plaintiff must "produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the defendant and that the defendant's actions adversely affected the plaintiff in some way." *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016) (quoting *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013)); *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1038 (9th Cir. 2020). A plaintiff does not have to prove "that the discriminatory purpose was the sole purpose of the challenged action, but only that it was a 'motivating factor.'" *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015).

The States' factual allegations, which must be taken as true and with reasonable inferences drawn in their favor, establish each of *Arlington Heights'* intent factors, recognized by the Ninth Circuit in *Arce*:

> The Supreme Court articulated the following, non-exhaustive factors that a court should consider in assessing whether a defendant acted with discriminatory purpose: (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision; (3) the specific sequence of events leading to the challenged action; (4) the defendant's departures from normal procedures or substantive conclusions; and (5) the relevant legislative or administrative history.

793 F.3d at 977 (citing *Arlington Heights*, 429 U.S. at 266); *see also Ave. 6E Invs.*, 818 F.3d at 504; *see also New York v. U.S. Dep't of Commerce*, 315 F.Supp. 3d 766, 806 (S.D.N.Y. 2018), *aff'd in relevant part and rev'd in part*, _ U.S. _, 139 S. Ct. 953 (2019) (plaintiffs may "plausibly allege that Defendants' decision was motivated by discriminatory animus and its application results in a discriminatory effect"). The States have pleaded facts establishing all of these factors.

First, the States have alleged that the Rule is "more likely to prevent immigrants of color in the United States from adjusting their status, or extending or changing their visas, compared to their White immigrant counterparts." Compl. ¶ 107, *see also* ¶¶ 7, 102-106, 305. Indeed, Defendants' own analysis predicted that the Rule "may impact in greater number communities of color […] and therefore may impact the overall composition of immigration with respect to those groups." 84 Fed. Reg at 41,369. There is no question that "the impact of the official action … bears more heavily on one race than another." *Arce*, 793 F.3d at 977 (citing *Arlington Heights*, 429 U.S. at 266).

Second, the States allege that the Rule reflects "a pattern of bias against Mexicans, Latinos, Africans, Haitians, and other non-White, non-European immigrants."[10] Compl. ¶ 284. Because "officials … seldom, if ever, announce … that they are pursuing a particular course of action because of their desire to discriminate against a racial minority," it is appropriate to examine "whether they have 'camouflaged' their intent." *Arce*, 793 F.3d at 978 (quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064, 1066 (4th Cir. 1982)); *see also Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, 641 F. Supp. 2d 563, 571 (E.D. La. 2009) ("The references to 'ghetto,' 'crime,' 'blight,' and 'shared values' are similar to the types of expressions that courts in similar situations have found to be nothing more than 'camouflaged racial expressions.'").

Here, the "pattern of bias" began with President Trump's pre-election statements. Among other things, then-candidate Trump characterized Mexican immigrants as "rapists" and "people who have a lot of problems"; and claimed that under his presidency the United States would "no longer take care" of "anchor babies" from Mexico. Compl. ¶¶ 285-87; *see also Washington v. Trump*, 847 F.3d at 1167 (allegations concerning President's statements support claim of discriminatory intent). This pattern of discriminatory statements continued after he took office, as the President has "repeated incendiary language at rallies and in social media conflating the issue of immigration with criminality, and raising the specter of invasion at the Southern border by

[10] Defendants also urge the Court to dismiss the sixth and final claim because it fails to identify a protected class, but this claim incorporates by reference the States' previous allegations, which include that the Rule is intended to target immigrants of color, a politically unpopular group. *See* Compl. ¶ 305, 345.

individuals from Mexico and Central America," and referring to such immigrants as animals. Compl. ¶¶ 288, 292-294. President Trump has expressed a preference for more immigrants from places like the predominantly White Norway, and used "vile, vulgar" language when complaining about immigration from predominantly non-White countries.[11] Compl. ¶ 292. These statements suggest that the Rule was adopted "at least in part 'because of,' not merely 'in spite of,'" its adverse effects on immigrants of color. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

Defendants argue that the States have failed to state an equal protection claim because the alleged statements demonstrating animus concern "immigration in general" and have "no express connection" to the Rule. Mot. at 19, 21. But at this early stage, plaintiffs need only raise a "plausible inference that racial animus underlay" executive action. *Arce*, 793 F.3d at 978. Numerous statements showing animus do indicate a connection to policies like the Rule that will reduce family-based immigration among non-White groups. *See, e.g.*, Compl. ¶ 286 (stating that the United States would "no longer take care" of "anchor babies"); ¶ 292 (seeking to reduce immigrants from "shithole countries"); ¶ 299 ("You can't break up rat families").[12] Moreover, these statements were made by decisionmakers, including the President, in connection with the President's own immigration policy agenda, of which the Rule is a centerpiece. The statements are thus readily distinguishable from the type of "stray remarks" made in passing that are insufficient to establish animus. *See Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027 (9th Cir. 2005) ("Where a decisionmaker makes a discriminatory remark against a member of the

[11] Even if President Trump and his administration "do not personally hold such views, courts have held that "the presence of community animus can support a finding of discriminatory motives by government officials." *Ave. 6E Invs.*, 818 F.3d at 504. Plaintiffs have alleged repeated public communications reflecting President Trump's response to and cultivation of anti-Mexican and Latino animus among his supporters. Compl. ¶¶ 285, 288, 293. Thus, the decision to promulgate the Rule may also reasonably be inferred to be a response to constituents' bias. *See also Romer v. Evans*, 517 U.S. 620, 635 (1996) (rejecting argument that challenged law was justified by, among other things, respect for member of the public with personal or religious objections to homosexuality).

[12] President Trump's "shithole countries," comment arose in the context of providing relief for Temporary Protected Status (TPS). The Trump administration had earlier ordered the termination of TPS for El Salvador, Nicaragua, Haiti and Sudan, which strip lawful status from over 200,000 people, who have lived in the United States for decades, including many who have U.S. citizen children. *See Ramos v. Nielsen*, 321 F.Supp.3d 1083, 1091 (N.D. Cal. 2018).

plaintiff's class, a reasonable factfinder may conclude that discriminatory animus played a role in the challenged decision."). In any event, the States have plausibly alleged that the President's animus influenced the outcome of DHS's decision-making. *See Ramos*, 321 F. Supp. 3d at 1124 (denying motion to dismiss based on allegations that Trump's public statements influenced DHS).

As to the third, fourth, and fifth *Arlington Heights* intent factors, plaintiffs' allegations point to circumstantial evidence of discriminatory animus in "[t]he specific sequence of events leading up to the challenged decision," in "the defendant's departures from its normal procedures or substantive conclusions," and in the "relevant … administrative history." *Arce*, 793 F.3d at 977 (citing *Arlington Heights*, 429 U.S. at 266-68); *see* Compl. ¶¶ 295-302. Defendants attempt to separate the President and senior officials' statements from the agency's motives, Mot. at 21, but this argument ignores the States' allegations that the White House engaged in manipulation of agency leadership and atypical rushing of the Rule. Compl. ¶¶ 300-301. This procedural history is a topic for which a sensitive factual inquiry under *Arlington Heights* is appropriate.

Defendants argue that the Court should apply not the framework for evaluating equal protection claims articulated in *Arlington Heights* and subsequent Ninth Circuit decisions, but the more deferential standard set forth in *Trump v. Hawaii*, 138 S. Ct. 2392, 2418-19 (2018). But as the Ninth Circuit has held, the broader *Arlington Heights* inquiry is appropriate where (as here) DHS's action applies to people who are already residing in the United States, and is not justified by national security concerns. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec*, 908 F.3d 476, 519-520 (9th Cir. 2018), *cert. granted sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019); *see also Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (en banc) (the equal protection clause applies to persons within U.S. borders); *NAACP v. U.S. Dep't of Homeland Sec.*, 364 F.Supp.3d 568, 576 (D. Md. 2019) (distinguishing *Trump v. Hawaii* based on absence of national security concerns and presence of foreign nationals already in the United States, and applying *Arlington Heights* standard of review to government decision to end program for Haitians); *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1095 (N.D. Cal. 2018) (noting that arguments regarding President Trump's anti-Latino statement are more likely

to carry weight "in the context of a program like DACA or TPS programs that involve only individuals located in the United States").

Defendants' focus on the length of the preamble and the notice of proposed rulemaking is insufficient to insulate the Rule from judicial scrutiny in light of the States' plausible allegations that the Rule was motivated by invidious discrimination. The Court should not accept at face value the Rule's stated objectives and reasoning, but instead should examine whether animus was a motivating factor. *See Arce*, 793 F.3d at 977 (plaintiff need not prove that discriminatory purpose was the sole purpose); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (holding complaint should not be dismissed if parties both advance plausible explanations).

The States' pleadings regarding animus are sufficient to state an equal protection claim within the *Arlington Heights* framework, but even if the Court were to apply *Trump* instead, the States' equal protection claims should not be dismissed. As the Court noted in its order regarding the States' motion to compel, "defendants have not cited any controlling case that prohibits discovery even in cases governed by rational basis review." Discovery Order at 30. While rational basis review would impact how the Court will eventually consider the evidence, it should not prevent the States from seeking discovery regarding the motivations and process that produced this Rule. *See Trump*, 138 S. Ct. at 2420 (noting that a court applying rational basis standard may consider extrinsic evidence). Moreover, a policy enacted out of animus against a particular group fails even rational basis scrutiny, as it "lacks a rational relationship to legitimate state interests." *Romer*, 517 U.S. at 632.

The States have adequately pleaded a violation of equal protection.

CONCLUSION

For the reasons described above, the States request that the Court deny Defendants' motion to dismiss the complaint.

Dated: May 6, 2020

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SA2018100389