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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants

No. 4:19-cv-5210-RMP

REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

Noted for: July 13, 2020
Without Oral Argument

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I. The Court's Preliminary Injunction Ruling Does Not Determine the Outcome of Defendants' Motion to Dismiss

Plaintiffs insist that the Court should decline to consider the substance of Defendants' Motion to Dismiss ("Motion") because this Court previously issued a preliminary injunction enjoining the Rule. Opp'n at 3. But the Ninth Circuit has since stayed that injunction in a published opinion. *See City and Cty. of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). The Ninth Circuit's opinion directly refutes several of Plaintiff's arguments against dismissal.[1]

Relying on *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020), Plaintiffs argue that the Ninth Circuit's stay opinion "should not sway this Court," because it was issued by a motions panel. Opp'n at 4. The *East Bay* decision addresses only whether a Ninth Circuit merits panel may reconsider a decision by a Ninth Circuit motions panel. 950 F.3d at 1263 (discussing "[r]econsideration of a motions panel's decision by a merits panel"). It does not suggest that a district court may rule on questions of law contrary to a published, precedential Ninth Circuit decision simply because the decision was issued by a motions panel. It may not. *See In re Zermeno-Gomez*, 868 F.3d 1048, 1053 (9th Cir. 2017) ("we have unequivocally stated that a published decision

[1] The Supreme Court, too, stayed preliminary injunctions of the public charge rule, including one involving an equal protection claim similar to that alleged in this case. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook County*, 140 S. Ct. 681 (2020).

constitutes binding authority and must be followed unless and until it is overruled by a body competent to do so"). Indeed, it is "clear error for a district court to disregard a published opinion of" the Ninth Circuit. *Id*. As Plaintiffs note, "there are important differences between a preliminary injunction and a stay pending review," Opp'n at 4, but that point has little relevance to the questions of law decided in the stay opinion and which are controlling here.

Even if the *East Bay* decision were construed to mean that the *San Francisco* opinion is not binding on this Court, *San Francisco* at least would be persuasive. *See East Bay*, 950 F.3d at 1265 ("we treat the motions panel's decision as persuasive, but not binding"). Just as a "later merits panel should not 'lightly overturn a decision made by a motions panel,'" *id*. at 1262, this Court should not lightly rule contrary to the opinion in *San Francisco*.[2]

[2] Plaintiffs' observation that the stay decision was issued "without oral argument, on an abbreviated timeline, with limited briefing, and without the benefit of a complete record," Opp'n at 4, does not establish a basis to disregard the published opinion. Moreover, it overlooks that the Court of Appeals' lengthy opinion addressed and disagreed with the very reasoning that Plaintiffs now urge this Court to reaffirm. Plaintiffs also forget that no "complete record" is needed to adjudge the purely legal questions implicated by Defendants' Motion.

II. Plaintiffs Lack Article III and Prudential Standing

A. Plaintiffs Lack Article III Standing[3]

The Complaint does not include a sufficient, non-speculative allegation of injury. In their response, Plaintiffs largely rely on injury theories that hinge on independent decisions of aliens which *may*, collectively, have down-stream economic effects on States. First, Plaintiffs claim that the Rule will cause aliens to minimize use of federal benefits, and thus rely more on State benefits. *See* Opp'n at 5-6. But as noted in the Motion, Plaintiffs assert that aliens do not meaningfully distinguish between federal and State benefits, and that the Rule would have "broader chilling effects among all state-run assistance programs," thus discouraging reliance on State-benefits. Mot. at 7. And even if certain aliens do turn to State services, Plaintiffs suffer injury only if they are subject to a net financial harm. *Id*. Plaintiffs do not allege this type of net harm, much less allege that it is "certainly impending."[4] *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990).

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[3] Because the Ninth Circuit's stay opinion controls here, Defendants concede that in addition to resolving various merits arguments, it resolves Defendants' standing arguments on the APA claims (though Defendants reiterate those arguments here to preserve them for appeal). The Ninth Circuit did not resolve Plaintiffs' standing to raise their equal protection claims or the zone of interests arguments.

[4] According to Plaintiffs, Defendants' argument that the Rule could result in a net-savings for States is "speculation." Opp'n at 6. But *Plaintiffs* have the burden of establishing standing. Given Plaintiffs' concession that the Rule will result in certain cost-savings,

Plaintiffs also cite to *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). But there, the Supreme Court held that plaintiffs had standing since depressed Census response rates were "the predictable effect" of a Census citizenship question, and this would have certain definitive effects on States, including "diminishment of political representation." *Id.* at 2565-66. Here, even assuming that alien dis-enrollment from certain federal benefit programs is a "predictable effect" of the Rule, there are no definitive effects on States analogous to those in *Department of Commerce*. In that case, there was no indication that a depressed Census turnout could benefit the plaintiffs. Here, there are many indications—including from Plaintiffs themselves—that the Rule *would* benefit Plaintiffs.

B. Plaintiffs Are Outside the Relevant Zone of Interests and Lack Third-Party Standing

In any event, even if Plaintiffs establish Article III standing, they must also demonstrate that "the injury [they] complain[] of . . . falls within the 'zone of interests' sought to be protected by the" public charge inadmissibility "statutory provision." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). Unlike aliens who are directly subject to exclusion under this provision, Plaintiffs' stated "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). Indeed, although the public charge inadmissibility provision seeks to conserve federal and State resources by excluding aliens who are likely to

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Plaintiffs must put forth a well-pled allegation that these cost-savings will not eclipse any cost-increase to States.

consume public benefits, the States here seek to conserve their resources by *enhancing* reliance on federal resources. Plaintiffs' interest here is practically the inverse of the interest sought to be protected by the public charge inadmissibility provision.

In response, Plaintiffs first argue that their alleged injuries fall within the relevant zone of interests since the public charge inadmissibility provision was enacted with the intent of protecting "state fiscs." Opp'n at 8. The provision intended to protect State fiscs by rendering inadmissible those who are likely to rely on public resources; not by increasing reliance on federal benefits. Plaintiffs also argue that the provision contemplates State involvement in issues pertaining to a public charge inadmissibility determination, since States help administer public benefits relevant to public charge inadmissibility determinations. *See id.* But the question is not whether States have any connection at all to public charge inadmissibility determinations, but rather whether "the injury [they] complain[] of" is one for which Congress would have intended to authorize suit. *Lujan*, 497 U.S. at 883. Even if Congress anticipated that States would help administer the relevant federal benefit programs, that does not mean Congress intended to authorize States to bring suit based on the public charge inadmissibility provision in order to increase reliance on federal benefit programs.

For similar reasons, Plaintiffs also cannot establish third-party standing for their equal protection claim. "It is a well-established rule that a litigant may assert only his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties." *Coal. of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002). There are "three requirements for third-party standing: (1) injury-

in-fact; (2) close relationship to the third party; and (3) hindrance to the third party." *Id.* Here, Plaintiffs are not claiming that they were deprived of the right to equal protection; they allege only that the Rule may unlawfully discriminate against "Latinos and other people of color." Am. Compl. ¶ 431. Indeed, Plaintiffs failed to even attempt to distinguish the Supreme Court decision cited in the Motion holding that a "State does not have standing as parens patriae to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16 (1982).

III. The Rule Is Not Contrary to Law

A. The Rule Is Not Contrary to the Immigration and Nationality Act ("INA")

1. Congress has not addressed the "precise question presented"

Plaintiffs urge—inexplicably, given the Ninth Circuit's recent opinion—that they should prevail at *Chevron* step one. Opp'n at 9-11 ("Congress addressed the precise question presented."). As the Ninth Circuit has already ruled in a precedential opinion, Congress has done no such thing.

Plaintiffs cite three statutes "in which Congress expressly authorized lawful immigrants to receive the specific types of non-cash benefits the Rule now makes a basis for exclusion." Opp'n at 10 (citing PRWORA, the Agricultural Research, Education and Assistance Act of 1998, and the Farm Security and Rural Investment Act of 2002). But Congress's enhancement of a safety net does not mean that Congress wanted to admit aliens who are likely to need it. And needless to say, none of those statutes altered the meaning of "public charge" in the INA, 8 U.S.C. § 1182(a)(4). Indeed, they must be read in harmony with the INA, which the Ninth Circuit easily concluded encompassed the

Rule's definition. *San Francisco*, 944 F.3d at 799. In fact, the Ninth Circuit's conclusion was "reinforced by" PRWORA. *Id.*

The Ninth Circuit also considered and rejected Plaintiffs' recycled argument that "Congress's repeated rejection of efforts to expand the public charge exclusion constituted additional evidence of its clear intent to reject the Rule." Opp'n at 10. *See San Francisco*, 944 F.3d at 797 ("If this legislative history is probative of anything, it is probative only of the fact that Congress chose *not* to codify a particular interpretation of 'public charge.'"); *id.* at 798 (reasoning that "the failure of Congress to *compel* DHS to adopt a particular rule is not the logical equivalent of *forbidding* DHS from adopting that rule"). Those rulings are controlling here.

2. The Rule is consistent with the statutory text

Plaintiffs argue that the Rule "cannot be reconciled with [c]ongressional intent as reflected in the statutory text." Opp'n at 11-12. Once again, their argument runs headlong into the Ninth Circuit's recent conclusion, and Plaintiffs fail to show any basis to disregard that conclusion.

The Ninth Circuit rightly observed that the word "opinion" is classic "language of discretion," under which immigration "officials are given broad leeway." *San Francisco*, 944 F.3d at 791. The Court of Appeals concluded further 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." *Id.* at 792. Neither of those conclusions changed after examining the "history of the term 'public charge.'" *Id.* Indeed, the Ninth Circuit found it "apparent that Congress left DHS and other agencies enforcing our immigration laws the flexibility

to adapt the definition of 'public charge' as necessary." *Id.* at 797 (citation omitted). This belies the "plain statements of congressional intent" suggested by the Plaintiffs, and renders irrelevant the dictionaries that they cite. Opp'n at 11-12.

3. The Rule does not contradict any "consistent line of judicial decisions"

Plaintiffs put the burden on Defendants to cite judicial decisions "holding that the public charge exclusion applies to noncitizens who received modest public benefits on a temporary basis." Opp'n at 12-15. But that inverts the legal standard applicable here; because Congress "has not spoken to how 'public charge' should be defined," *San Francisco*, 944 F.3d at 797, it would take a "consistent line of judicial decisions" in *Plaintiffs'* favor to cabin the otherwise ambiguous text.

Plaintiffs have offered no such decisions. The *only* Supreme Court case they cite is *Gegiow v. Uhl*, in which "[t]he single question" was "whether an alien [could] be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." 239 U.S. 3, 9-10 (1915); *see Cook Cty., Illinois v. Wolf*, -- F.3d --, No. 19-3169, 2020 WL 3072046, at *9 (7th Cir. June 10, 2020) ("the question presented" in *Gegiow* "was a narrow one"). The sole textual basis on which the Court held that aliens must be judged in their individual circumstances was the proximity of "public charge" to "paupers" and "professional beggar" in the statute. Those terms all connoted "permanent *personal* objections." *Gegiow*, 239 U.S. at 10 (emphasis added). Third, Congress acted immediately to sever the connection between "public charge," "pauper," and "professional beggar," thus eviscerating the sole ground on which

Gegiow stood. *See* Immigration Act of 1917, 64th Cong. ch. 29 § 3, 39 Stat. 874, 876 (moving "public charge" down the list of inadmissible classes of aliens, away from "pauper" and "public charge," with no other change). The history preceding and accompanying the 1917 amendment confirms what the text suggests: that the amendment was meant to counteract *Gegiow*.[5]

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[5] Shortly after the *Gegiow* decision, the Secretary of Labor sent a letter to Congress, requesting that the statute be amended to supersede the Supreme Court's ruling. *See* Letter from Sec. of Labor to House Comm. on Immig. and Naturalization, H.R. Doc. No. 64-886, at 3 (Mar. 11, 1916); 83 Fed. Reg. 51,114, 51,125 (Oct. 10, 2018). The Secretary defined "public charge" in accordance with its meaning at the time: as "a charge (an economic burden) upon the community" in which an alien intends to reside. The Secretary then explained that the Court's opinion in *Gegiow* had highlighted a never-before recognized "defect in . . . the arrangement of the wording," which, if left uncorrected, would "materially reduce[] the effect of the clause" in protecting the public fisc.

A Senate Report described the amendment as follows: "The purpose of this change is to overcome recent decisions of the courts limiting the meaning of the description of the excluded class. . . . (See especially *Gegiow v. Uhl*, 239 U.S., 3.)." S. Rep. No. 64-352, at 5 (1916); *see also* H.R. Doc. No. 64-886, at 3-4 (1916); 1917 Act § 3 n.5; as reprinted in Immigration Laws and Rules of January 1, 1930 with Amendments from January 1, 1930 to May 24, 1934 (1935) (explaining that "[t]his clause . . . has been shifted . . . to indicate

Contrary to the authorities cited by Plaintiffs, Opp'n at 13, courts in the wake of the 1917 amendment recognized that the term "public charge" is "not associated with paupers or professional beggars." *Ex Parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923) (explaining that "public charge" in the 1917 Act "is differentiated from the application in *Gegiow*"); *see also United States ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929) (L. Hand, J.) (explaining that in the wake of the 1917 Immigration Act, the public-charge statute "is certainly now intended to cover cases like *Gegiow*"). At least two of Plaintiffs' opposite cases—*Howe* and *Ng Fung Ho*—were cited by the Ninth Circuit in staying the preliminary injunctions. *See San Francisco*, 944 F.3d at 794.

Finally, the passage from Judge Feinerman's opinion quoted by Plaintiffs was expressly rejected by the Seventh Circuit. *Compare* Opp'n at 14 ("the Supreme Court told us just over a century ago what 'public charge' meant in the relevant era, and thus what it means today." (quoting *Cook Cty., Illinois v. McAleenan*, 417 F. Supp. 3d 1008, 1023 (N.D. Ill. 2019)) *with Cook Cty.*, 2020 WL 3072046, at *9 ("[W]e are not persuaded that the Supreme Court [in *Gegiow*] necessarily ruled so broadly."). That leaves Plaintiffs arguing that both the Ninth *and* Seventh Circuits are wrong. Opp'n at 14 & n.2. The far likelier explanation is that Plaintiffs are overstating the import of *Gegiow*.

4. The Rule does not contradict any "uniform agency action"

Plaintiffs describe three administrative decisions as a "consistent line," which

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the intention of Congress that aliens shall be excluded upon said ground for economic as well as other reasons" and "overcoming the decision of the Supreme Court in *Gegiow*").

"shows that mere temporary receipt of public benefits is insufficient to render someone a public charge." Opp'n at 15-18. That is not correct.

Defendants agree with *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409 (B.I.A. 1962; A.G. 1964), that the public charge determination "requires more than a showing of a possibility that the alien will require public support." *Id.* at 421. Rather, the alien must be "*likely* at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A) (emphasis added). Defendants also agree that the determination must be made based on "[s]ome specific circumstance," 10 I & N. at 421, which is why the Rule adopts a totality of circumstances test. Defendants also agree with *Matter of Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974) which states that the "determination of whether an alien is likely to become a public charge under section 212(a)(15) is a prediction based upon the totality of the alien's circumstances at the time he or she applies for an immigrant visa or admission to the United States." And Defendants agree with *Matter of Harutunian*, both that the 1917 statutory amendment was "to nullify [*Gegiow*'s] restrictive interpretation of the statute" and that, under the INA currently, "any alien who is incapable of earning a livelihood, who does not have sufficient funds in the United States for his support, and has no person in the United States willing and able to assure that he will not need public support is excludable as likely to become a public charge." *Matter of Harutunian*, 14 I. & N. Dec. 583, 587, 589-90 (BIA 1974).[6] Consistent with these decisions and the INA itself, the

[6] *Matter of Harutunian* did *not* hold that "'essentially supplementary benefits, directed to the general welfare of the public as a whole' [are] not a basis for exclusion." *Contra*

Rule imposes a totality of circumstances test, under which receipt of welfare does not render an alien per se inadmissible or ineligible for adjustment of status.

Neither of the administrative promulgations cited by Plaintiffs helps them. The 1987 final rule on adjustment of status was implementing a different provision of law altogether – a special amnesty for aliens enacted in the Immigration Reform and Control Act of 1986 – so it is irrelevant here. *See Adjustment of Status for Certain Aliens*, 52 Fed. Reg. 16205, 16216 (May 1, 1987) (legislation reflected special "concerns for certain aliens who have been residing illegally in the United States" including by providing a "special rule for determination of public charge"). Also, that that rule defined the term "public cash assistance" not to include *non-cash* assistance is hardly surprising. *Id*. at 16209. The fact that the regulation referred to "needs-based monetary assistance" as "designed to meet subsistence levels" is not equivalent to declaring that "assistance in kind" is "*not* a basis for exclusion" under the public charge provision. Opp'n at 16 (emphasis in original). And even if it were, nothing stops an agency from changing its interpretation of an ambiguous statute. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (finding "no basis in the Administrative Procedure Act . . . for a

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Opp'n at 15-16. The quoted passage was taken from dicta in the opinion that actually cuts against Plaintiffs' assertion: "Nor can there be any doubt that old age assistance is individualized public support to the needy, as distinguished from essentially supplementary benefits, directed to the general welfare of the public as a whole." *Matter of Harutunian*, 14 I. & N. Dec. 583, 589 (BIA 1974).

requirement . . . [of] more searching review" when an agency changes its position). Rather, the question is always whether the interpretation at issue is reasonable under the statute. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

That leaves the 1999 Field Guidance. *See* Opp'n at 16. What Plaintiffs omit is that the accompanying notice of proposed rulemaking specifically noted that the term "public charge" was "ambiguous"; that it had "never been defined in statute or regulation"; and that the 1999 Guidance's definition was only one "reasonable" interpretation of the term. 64 Fed. Reg. 28676, 28676-77. That is entirely consistent with the foregoing authorities, and it dispels any suggestion that a "consistent line of agency decisions and interpretations" supports Plaintiffs' view. Instead, as the Seventh Circuit recognized, "[w]hat has been consistent is the delegation from Congress to the Executive Branch of discretion, within bounds, to make public-charge determinations." *Cook Cty.*, 2020 WL 3072046, at *11.

5. Congress has not ratified Plaintiffs' understanding of "public charge"

Plaintiffs argue that Congress has repeatedly reenacted the "public charge" provision "without substantive change," which "ratified the settled understanding that an immigrant must receive more than temporary, modest benefits to be deemed a public charge." Opp'n at 18 (quotation marks omitted).

This argument fails for several reasons. First, in order to be deemed incorporated by congressional reenactment, an administrative interpretation must be "uniform and well

understood." *Bernardo v. Johnson*, 814 F.3d 481, 490 n.12 (1st Cir. 2016) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 380 (1982)).[7] For the reasons stated above, Plaintiffs' present interpretation "was neither well understood nor a widely accepted part of the contemporary legal landscape." *Id.* Second, Congress *has* made "relevant changes" to the public charge provision. In 1917, Congress moved "public charge" far away from "paupers" and "professional beggars" in order to overcome the reasoning of *Gegiow*. In 1952, Congress added language committing public charge inadmissibility determinations to the Executive Branch's "opinion." Pub. L. No. 82-414 § 212(15) (1952). And in 1996, Congress introduced the affidavit of support provision, discussed below. Third, Congress's repeated decision to leave the term undefined only confirms its decision to leave the term's definition in the discretion of the Executive Branch. *San Francisco*, 944 F.3d at 797. Finally, as to the 1999 Field Guidance, the "public charge" provision has not been reenacted since that non-binding interpretation was issued.

6. The battered-alien and affidavit-of-support provisions support Defendants' argument

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

Plaintiffs deny that the battered-alien and affidavit-of-support provisions in the INA support Defendants' argument. Opp'n at 19-21. Plaintiffs are wrong again.

With respect to the affidavit-of-support provision introduced by PRWORA in 1996, Plaintiffs first argue that Congress did not mean to "change the public charge standard." Opp'n at 19. But Defendants have never argued that PRWORA changed the meaning of "public charge." Far from an "elephant in [a] mousehole[]," *id.* (quoting *Whitman v. Am Trucking Ass'ns*, 53 U.S. 457, 468 (2001)), the affidavit-of-support provision merely shows that Congress did not hold Plaintiffs' view of the term "public charge." Thus, Congress provided that the mere *possibility* that an alien might obtain unreimbursed, means-tested public benefits was sufficient to render that alien inadmissible on the public charge ground. That accords with the statements of immigration policy enacted through PRWORA, that "aliens within the Nation's borders not depend on public resources to meet their needs" and that "the availability of public benefits not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(2).

Plaintiffs have no answer to the battered-alien exception, 8 U.S.C. §§ 1182(s), 1641(c). The fact that "these [excluded] benefits include cash benefits that would have been considered in public charge determinations under the 1999 Field Guidance," Opp'n at 20, does not explain why the exception also includes *non-cash* benefits. *See* 8 U.S.C. §§ 1611-13 (specifying the public benefits for which battered aliens and other qualified aliens are eligible). The explanation is obvious: DHS would, ordinarily, consider the receipt of benefits in making public charge inadmissibility determinations.

7. Defendants Prevail at *Chevron* Step Two

Plaintiffs maintain, based on the foregoing arguments, that they should prevail at *Chevron* step one—that is, that "public charge" unambiguously means what Plaintiffs say it does. That argument has now been rejected by two U.S. Circuit Courts of Appeal, including the Ninth Circuit in a binding opinion. *See San Francisco*, 944 F.3d at 796-97 ("'public charge' does not have a fixed, unambiguous meaning"); *Cook County*, 2020 WL 3072046, at *11 ("[T]his case cannot be resolved at *Chevron* step one.").

Plaintiffs argue in the alternative that they should prevail at *Chevron* step two. But they acknowledge that that argument depends on "many of the same reasons" as the step-one argument. Opp'n at 23. And while they suggest "independent reasons" why they should prevail at step two, they offer only one: that "the Final Rule does not actually apply a totality-of-the-circumstances test (despite DHS's insistence otherwise)." Opp'n at 24. That argument fails.

The Rule clearly 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. The Rule "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). 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 conflate the *definition* of public charge with the *factors* considered in determining, as a predictive matter, whether one is likely at any time to become a public charge. Opp'n at 24 ("[T]he Final Rule creates an impermissibly strict test: use of public benefits."). But the "12/36 standard" is not a test of whether someone is likely to become a public charge; it is the definition of a public charge. The Rule indisputably employs a multifactor test to predict *whether* an alien would consume that quantum of public benefits—including the statutorily prescribed factors. That is the essence of a totality of circumstances test.

B. The Rule Does Not Conflict with PRWORA

Plaintiffs allege that the Rule is "not in accordance with" PRWORA because that Act expresses Congress's intent to allow qualified aliens to receive certain public benefits. Am. Compl. ¶¶ 7, 417(d); Opp'n at 10. However, Plaintiffs do not respond to

Defendants' arguments that the Rule does not actually interfere with or limit such aliens' entitlement to receive those benefits. 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 PRWORA. Moreover, *all* public benefits, including those cash benefits that could already be considered under the 1999 Field Guidance, are authorized by law, so the mere fact that Congress allows certain benefits to be used cannot invalidate consideration of that benefit use for the purposes of the public charge inadmissibility statute.

C. The Rule Does Not Conflict with § 504 of the Rehabilitation Act

The Ninth Circuit definitively rejected Plaintiffs' Rehabilitation Act claim in *San Francisco*, 944 F.3d at 800, and none of the arguments in Plaintiffs' opposition undermine that analysis. Plaintiffs neither contest that the public charge inadmissibility statute requires Defendants to consider health in their inadmissibility determination nor that disability is not the sole determinant of inadmissibility under the totality of the circumstances test.

Plaintiffs do contend that the Rule improperly double or triple counts an alien's disability as multiple negative factors. Not only is this untrue, but Plaintiffs have not explained why this would create a conflict with § 504. First, disability is not inherently a

negative factor in the totality of the circumstances analysis. An alien's medical condition is only one factor that may be considered and is relevant only to the extent that an alien's particular condition tends to show that he is "more likely than not to become a public charge" at any time. Rule at 41368. Further, any weight assigned to this factor may be counterbalanced by other factors, including "[an] affidavit of support," "employ[ment]," "income, assets, and resources," and "private health insurance." *Id.* Second, all covered aliens, disabled or not, are subject to the same inquiry: whether they are likely to use one or more covered federal benefits for the specified period of time. Therefore, the use of Medicaid benefits, which Plaintiffs point to, is a factor considered for all alien applicants regardless of their medical status.

Plaintiffs also argue that the Ninth Circuit improperly concluded that the public charge statute "controls" the Rehabilitation Act because the former is more specific than the latter. Opp'n at 22. The Ninth Circuit actually held that the Rehabilitation Act's general prohibition of disability discrimination could not constrain the INA's "express direction" to consider health when determining inadmissibility. *San Francisco*, 944 F.3d at 800.

IV. Plaintiffs Fail to State a Claim that DHS Exceeded its Authority Regarding Nonimmigrant Visa Extensions and Changes of Status

Plaintiffs allege that the Rule improperly applies the public charge standard to applications for visa extensions and changes of status ultra vires. However this claim misunderstands the Rule and should be dismissed.

Plaintiffs claim that Defendants "admit[]" Congress did not authorize application

of the public charge standard to these other types of immigration actions and that they are "borrowing" that standard to establish a condition to qualify for these other forms of relief. Opp. at 25. However, Defendants' motion makes no such statements. *See* Mot. at 17-18. The Rule independently sets a new condition for approval of extension of stay and change of status applications and petitions pursuant to its ample statutory authority to impose such conditions. Plaintiffs' contention that there is no difference between the predictive, forward-looking public charge inadmissibility determination, and the exclusively backward-looking condition for extension of stay and change of status applications misconstrues the way in which the Rule operates.

For the public charge inadmissibility determination, past use of benefits is just one factor in the totality of the circumstances test to predict whether an alien is likely to use covered public benefits for 12 or more months over a 36 month period in the future. Conversely, for the extension of stay and change of status condition, proof that an alien has used covered benefits for 12 or more months in a 36 month period since gaining his or her nonimmigrant status is itself disqualifying. Aside from this basic structural difference, there are many elements of the public charge inadmissibility determination that are inapplicable to applications for extension of stay or change of status, and it is clear that applicants for these forms of relief are not subject to an inadmissibility determination.

DHS is well within its statutory authority to set conditions for these applications. *See* Rule at 41329 (citing 8 U.S.C. §§ 1184, 1258). DHS governs not only "[t]he admission to the United States of any alien as a nonimmigrant," 8 U.S.C. § 1184(a)(1),

but also how long, and under what conditions, the nonimmigrant can stay, *id.*, or change nonimmigrant statuses, *id.* § 1258. 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.

V. The Rule is Not Arbitrary or Capricious

Plaintiffs' Amended Complaint alleged 22 different reasons why Plaintiffs believe the Rule is arbitrary and capricious. *See* Am. Compl. ¶ 427; *cf. Fifth Third Mortg. Co. v. Chicago Title Ins. Co.*, 692 F.3d 507, 509 (6th Cir. 2012) ("When a party comes to us with nine grounds for reversing the district court, that usually means there are none."). Defendants' Motion explained why each of those reasons lacked merit, Mot. at 18-25, and Plaintiff have now abandoned almost all of them, Opp'n at 26-32. The only theory that Plaintiffs attempt to defend in their Opposition is their claim that "Defendants failed to address, justify, or meaningfully evaluate the significant harms identified by commenters as well as harms identified in the text of the Final Rule itself." Opp'n at 26-27. But the Ninth Circuit has already thoroughly analyzed and rejected that argument. *See San Francisco*, 944 F.3d at 801-05.

Plaintiffs inexplicably do not even attempt to explain why this Court should deviate from the Ninth Circuit's rulings on this issue. For instance, Plaintiffs do not identify any factual or legal error in the Ninth Circuit's analysis. Indeed, Plaintiffs fail to even

acknowledge the Ninth Circuit's precedential rulings on this issue, even though those rulings were discussed at length in Defendants' Motion. *See* Mot. at 23-25.

Instead of addressing the Ninth Circuit's ruling, Plaintiffs merely repeat arguments that the Ninth Circuit considered and rejected. That is not enough. First, Plaintiffs argue that DHS "declined to address the harms that it acknowledges will result from this chilling effect[.]" Opp'n at 27. But the Ninth Circuit disagreed, ruling that "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 Circuit determined that "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*. at 804. Likewise, Plaintiffs argue that "it is not enough for DHS to say it could not measure" the harms from the disenrollment impact. Opp'n at 28. But, again, the Ninth Circuit rejected that argument. *San Francisco*, 944 F.3d at 803 ("[DHS] did not attempt to quantify those costs, but it recognized the overall effect of the Final Rule, and that is sufficient.").

Likewise, DHS did not ignore "compelling evidence of public health crises likely to result from the Rule's implementation." Opp'n at 28. As the Ninth Circuit explained, "DHS not only addressed these concerns directly, it changed its Final Rule in response to the comments." *San Francisco*, 944 F.3d at 805. Plaintiffs also fault DHS because it allegedly has "no experience in health care policy." Opp'n at 29. But that just shows why DHS was *not* required to quantify the precise health care impact of the Rule. DHS's "only mandate is to regulate immigration and naturalization, not to secure transfer payments to

state governments or ensure the stability of the health care industry. Any effects on those entities are indirect and well beyond DHS's charge and expertise." *San Francisco*, 944 F.3d at 804.

For similar reasons, DHS adequately addressed comments raising concerns about the Rule's effects on children. Opp'n at 30-32. Those comments addressed harms to children resulting from disenrollment in benefits, but as discussed above, DHS provided a detailed response concerning the disenrollment impact and explained why the potential harms did not justify DHS inaction in meeting its statutory mandate to enforce the public charge inadmissibility statute. *See* Rule at 41312-14; *see also id*. at 41371 (recognizing that parents may decide to disenroll their children from public benefits programs but noting the Rule's purpose to ensure aliens are self-sufficient).

Plaintiffs also discuss comments questioning whether the Rule should apply to children at all because "they are too young to work and their use of public benefits in no way suggests they are likely to become a public charge in the future." Opp'n at 31. But DHS addressed those comments as well, noting that Congress explicitly required DHS to consider age in public charge determinations, *see* 8 U.S.C. § 1182(a)(4)(B)(i)(I), and that Congress has made children subject to the public charge ground of inadmissibility even while carving out other exceptions. *See* Rule at 41371.

Plaintiffs also note that DHS exempted Medicaid benefits received by individuals under the age of 21 but not SNAP benefits or federal housing assistance. Opp'n at 32. DHS, however, cited "strong legal and policy reasons to assume that Congress did not intend DHS to treat receipt of Medicaid by alien children under the age of 21 in the same

way as receipt of Medicaid by adult aliens." Rule at 41380. For example, Congress expressly provided that receipt of Medicaid by aliens under the age of 21 would not trigger a reimbursement requirement for the alien's sponsor under an Affidavit of Support but made no similar provision for SNAP or housing assistance. *Id*. at 41375 n.431, 41380; see also *id*. at 41374 (describing reasons for the Rule's inclusion of SNAP benefits); *id*. at 41376-78 (describing reasons for the Rule's inclusion of housing benefits). Moreover, Congress authorized states to expand Medicaid eligibility to aliens under the age of 21 without a waiting period, *id*. at 41380, whereas there is no similar authorization for housing benefits and the INA's waiver of the waiting period for SNAP applies only to "qualified aliens," 8 U.S.C. § 1613(a), (c)(2)(L), who are generally not subject to the public charge test, *see id*. § 1641(b). *See City & Cty. of S.F. v. USCIS*, 408 F. Supp. 3d 1057, 1112 (N.D. Cal. 2019) (rejecting the same argument because DHS "provided a reasoned explanation").

Finally, none of the decisions cited by Plaintiffs on this issue suggests any error in the *San Francisco* opinion, or any deficiency in the Rule. In *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050 (D.C. Cir. 1986), a statute specifically required the agency to "consider" a particular factor but the "entire administrative record contain[ed] only two fleeting references to" that factor. *Id*. at 1055. Here, in contrast, DHS extensively discussed potential harms from the Rule. Similarly, *American Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914 (D.C. Cir. 2017), concerned the unique requirements of a statute, not at issue here, that agencies must analyze the environmental consequences of proposed federal actions. *Id*. at 920, 930. The agency in that case failed to meet the

statutory requirement because it "did not accurately identif[y] the relevant environmental concern" and "refused to even consider the possibility of that broader, real-world impact." *Id*. at 931 (internal quotation marks omitted; alteration in original). And in *Center for Biological Diversity v. Zinke*, 900 F.3d 1053, 1068 (9th Cir. 2018), the court found that the agency had ignored contrary evidence. In contrast, here, as the Ninth Circuit found, "DHS addressed at length the costs and benefits" and explained why those costs did not justify abandoning the Rule. *See San Francisco*, 944 F.3d at 801-04.

VI. Plaintiffs Fail to State a Plausible Equal Protection Claim

Plaintiffs fail to state a plausible equal protection claim. As a threshold matter, Supreme Court "cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Thus, with respect to immigration policy, a highly "deferential standard of review" applies because "it is not the judicial role in cases of this sort to probe and test the justifications of" the executive branch. *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018). "A conventional application of" this standard asks "only whether the policy is facially legitimate and bona fide." *Id*. at 2420. In response, Plaintiffs argue that *Hawaii*'s narrow standard applies only in the national security context and does not apply to cases involving aliens in the United States. Opp'n at 39-40. That is incorrect. The *Hawaii* decision explained that the deferential standard was appropriate for cases involving "the admission and exclusion of foreign nationals," an area which is "largely immune from judicial control." *Id*. at 2418. There is no question that this case – which challenges

DHS's interpretation of the public charge *inadmissibility* statute – directly implicates the federal government's policies regarding the admission of aliens. Plaintiffs also argue that *Hawaii* dealt with aliens that were not already in the United States. *See* Opp'n at 40. But the fact that an alien seeking adjustment of status may be physically present in the United States is irrelevant because "[i]t is a well established fact that an applicant for adjustment of status under Section 245 of the Act is in the same posture as though he were an applicant before an American consular officer abroad seeking issuance of an immigrant visa for the purpose of gaining admission to the United States as a lawfully permanent resident." *Matter of Harutunian*, 14 I. & N. Dec. 583, 589 (BIA Feb. 28, 1974). Regardless of the location of the alien, DHS's determinations under 8 U.S.C. § 1182(a)(4) are determinations about *admissibility*, which is required for applicants seeking adjustment of status under 8 U.S.C. § 1255.[8]

Furthermore, the Supreme Court in *Hawaii* expressly stated that the deferential standard applies "across different contexts and constitutional claims." 138 S. Ct. at 2419. For authority, the Supreme Court cited *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir.

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[8] Plaintiffs' belief that the physical location of the alien determines the standard of review cannot be squared with the Supreme Court's explanation that judicial review for admission cases arises in situations where the government action "burdens the constitutional rights of a U.S. citizen," *Hawaii*, 138 S. Ct. at 2419, not based on where the alien may be located. Absent burdens on citizens' constitutional rights, there is no judicial review at all. *Id*.

2008), a case involving an equal protection challenge brought by aliens *inside* the country. The Court also cited *Fiallo*, a paternity/legitimacy case in which the Court had rejected the same type of reasoning as advanced by Plaintiffs here. *See Fiallo*, 430 U.S. at 796 (rejecting characterization of "prior immigration cases as involving foreign policy matters and congressional choices to exclude or expel groups of aliens that were specifically and clearly perceived to pose a grave threat to the national security . . . or to the general welfare of this country"). And the Supreme Court quoted its prior ruling that "*any* policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power." *Id*. (quoting *Harisiades v. Shaughnessy*, 342 U. S. 580, 588-89 (1952)) (emphasis added). Finally, Plaintiffs contend that the relevant statute in *Hawaii* conferred greater authority on the Executive than the statute at issue here. *See* Opp'n at 39. But Plaintiffs cannot cite to a single sentence in *Hawaii* where the Court indicated that the principles of deference that it relied upon were limited to, or otherwise turned on, the breadth of authority conferred by statute at issue there. Moreover, the Ninth Circuit expressly held that the public charge inadmissibility statute contains "the language of discretion, and the officials are given broad leeway." *San Francisco*, 944 F.3d at 791.

Plaintiffs fail to state an equal protection claim under the *Hawaii* standard, or even a less deferential standard. Plaintiffs rely on a string of policies and statements by White House officials which do not reference the Rule, and which say nothing of why the decision-maker—here, DHS—instituted the Rule. *See* Opp'n at 33-35. Indeed, the Supreme Court recently found that similar allegations were insufficient to support a valid

equal protection claim in *Department of Homeland Security v. Regents of the University of California*, No. 18-587, 2020 U.S. LEXIS 3254 (U.S. June 18, 2020) (opinion of Roberts, C.J.). There, as here, plaintiffs relied upon generic statements by the President, and the Court concluded that "these statements—remote in time and made in unrelated context—do not qualify as 'contemporary statements' probative of the decision at issue." *Id.* at *48. Further, here especially, the statements Plaintiffs rely upon cannot support an inference that the decision-makers acted with animus given the extensive justifications for the Rule laid out in its preamble, along with the elaborate notice-and-comment process that culminated in the Rule's final design. *Cf. id.* ("[T]here is nothing irregular about the history leading up to the September 2017 rescission.").

Plaintiffs also rely upon a statement made by Mr. Cuccinelli—then Acting Director of U.S. Citizenship and Immigration Services—in response to an abstract question concerning the meaning of the poem The New Colossus.[9] Opp'n at 35. This statement says nothing of why Mr. Cuccinelli supports the Rule, and elsewhere in the interview Mr. Cuccinelli specifically (and repeatedly) states that he supports the Rule because "self-sufficiency is a central part of America's proud heritage," and that "all [the Rule] does"

[9] To be clear, Cuccinelli did not state that the principles in this poem referred only to immigrants from Europe. In response to a question concerning the poem in general, he was instead providing the relevant historical context, and noted only that the poem's use of the term "wretched refuse," at the time, referred to certain people who were not "in the right class" within the "class based societies" of Europe.

is reflect the principle that "people coming to this country" are "expected to be able to support themselves." *See* CNN, Burnett challenges Cuccinelli on new immigration rule, YouTube (Aug. 13, 2019).

Finally, Plaintiffs cite to a recent decision in *Cook County, Illinois v. Wolf*, No. 19-6334, 2020 WL 2542155 (N.D. Ill. May 19, 2020), but the Court should not follow the reasoning in that decision, which predates the Supreme Court's *Regents* opinion. There, the court found that (i) the plaintiffs had sufficiently alleged that certain White House officials made general remarks—unrelated to the Rule—that the court had to accept as proof of animus at the motion to dismiss stage, and (ii) these White House individuals pushed for the Rule. *See id.* at *6-8. But this reasoning, and the arguments in Plaintiffs' response, share the same flaw: even if a court accepts that the plaintiffs have properly alleged animus in some form, there must still be an allegation tying this animus to the precise policy at issue here (the Rule). In *Cook County*, the court did not point to a well-pled allegation indicating that the Rule in particular was adopted with any discriminatory motive. Plaintiffs' complaint here fares no better.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Amended Complaint.

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all users receiving ECF notices for this case.

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