UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COOK COUNTY, ILLINOIS, *et al.*,

Plaintiffs,

v.

CHAD F. WOLF, in his official capacity as Acting Secretary of U.S. Department of Homeland Security, *et al.***,**

Defendants.

Civil Action No. 1:19-cv-06334

Hon. Gary S. Feinerman

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

On October 14, 2019, the Court issued a preliminary injunction against the Department of Homeland Security's final rule *Inadmissibility on Public Charge Grounds* ("Rule"), 84 Fed. Reg. 41292 (Aug. 14, 2019). *See* Mem. Op. & Order, Dkt. No. 86 ("PI Order"). The Court based its decision on the narrow grounds that, in its view, Plaintiffs were likely to prevail on their claim that the Rule conflicts with the Supreme Court's formulation of "public charge" in *Gegiow v. Uhl*, 239 U.S. 3 (1915). The Court did not pass judgment on Plaintiffs' other claims; *e.g.*, that the Rule allegedly violates the Rehabilitation Act and the Equal Protection component of the Fifth Amendment Due Process Clause, and is allegedly arbitrary and capricious under the Administrative Procedure Act ("APA"). Since then, the Ninth Circuit Court of Appeals has issued a detailed opinion concluding that the Rule falls well within the Executive Branch's discretion to interpret and implement the public charge inadmissibility provision in the Immigration and Nationality Act ("INA"). Importantly, the Ninth Circuit addressed *Gegiow*, and found that it does not set a fixed definition of "public charge," and certainly does not prevent the Executive Branch from construing the term to account for "changes in the way in which we provide assistance to the needy." *City and Cty. of San Francisco v. USCIS*, 944 F.3d 773, 796 (9th Cir. 2019). Particularly in light of the Ninth Circuit's ruling, and for the reasons discussed herein, Defendants respectfully submit that the Court should dismiss Plaintiffs' Complaint in full.

BACKGROUND

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

of their families, their sponsors, and private organizations." *Id*. Relatedly, "the availability of public benefits [is] not [to] constitute an incentive for immigration to the United States." *Id*. § 1601(2)(B).

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

In 1996, Congress enacted immigration and welfare reform statutes that bear on the public charge inadmissibility determination. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Division C of Pub. L. No. 104-208, 1110 Stat. 3009-546

(1996) strengthened the enforcement of the public charge inadmissibility ground in several ways. First, Congress instructed that, in making public charge inadmissibility determinations, "the consular officer or the Attorney General shall at a minimum consider the alien's: (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills," 8 U.S.C. § 1182(a)(4)(B), but otherwise left in place the broad delegation of authority to the Executive Branch to determine who constitutes a public charge. IIRIRA also raised the standards and responsibilities for individuals who must "sponsor" an alien by pledging to provide support to maintain that immigrant at the applicable threshold for the period of enforceability and requiring that sponsors demonstrate the means to maintain an annual income at the applicable threshold. Contemporaneously, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105, restricted most aliens from accessing many public support programs, including Supplemental Security Income ("SSI") and nutrition programs. PRWORA also made the sponsorship requirements in IIRIRA legally enforceable against sponsors.

In light of the 1996 legislative developments, the legacy Immigration and Naturalization Service ("INS") started in 1999 to engage in formal rulemaking to guide immigration officers, aliens, and the public in understanding public charge determinations. *See Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28676 (May 26, 1999) ("1999 NPRM"). No final rule was ever issued, however. Instead, the agency adopted the 1999 NPRM interpretation on an interim basis by publishing *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999) ("Field Guidance"). The Field Guidance dramatically narrowed the public charge inadmissibility ground by defining "public charge" as an alien who is likely to become "primarily dependent on the government for subsistence," and by

barring immigration officers from considering any non-cash public benefits, regardless of the value or length of receipt, as part of the public charge determination. *See id.* at 28689. Under that standard, an alien receiving Medicaid (other than for institutionalization for long-term care), food stamps, and public housing, but not cash assistance, would have been treated as no more likely to become a public charge than an alien who was entirely self-sufficient.

The Rule revises this approach and adopts, through notice-and-comment rulemaking, a well-reasoned definition of public charge providing practical guidance to DHS officials making public charge inadmissibility determinations. DHS began by publishing a Notice of Proposed Rulemaking, comprising 182 pages of description, evidence, and analysis. *See Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114 (Oct. 10, 2018) ("NPRM"). The NPRM provided a 60-day public comment period, during which 266,077 comments were received. *See* Rule at 41297. After considering these comments, DHS published the Rule, addressing comments, making several revisions to the proposed rule, and providing over 200 pages of analysis in support of its decision. Among the Rule's major components are provisions defining "public charge" and "public benefit" (which are not defined in the statute), an enumeration of factors to be considered in the totality of the circumstances when making a public charge determination, and a requirement that aliens seeking an extension of stay or a change of status show that they have not received public support in excess of the Rule's threshold since obtaining nonimmigrant status. The Rule supersedes the Interim Field Guidance definition of "public charge," establishing a new definition based on a minimum time threshold for the receipt of public benefits. Under this "12/36 standard," a public charge is an alien who receives designated public benefits for more than 12 months in the aggregate within a 36-month period. *Id*. at 41297. Such "public benefits" are extended by the Rule to include many non-cash benefits: with some exceptions, an alien's participation in the Supplemental

Nutrition Assistance Program ("SNAP"), Section 8 Housing Programs, Medicaid, and Public Housing may now be considered as part of the public charge inadmissibility determination. *Id*. at 41501-02. The Rule also enumerates a non-exclusive list of factors for assessing whether an alien is likely at any time to become a public charge and explains how DHS officers should apply these factors as part of a totality-of-the-circumstances determination.[1]

STANDARD OF REVIEW

"A complaint will survive a 12(b)(6) motion if, after the court disregards any portions that are no more than conclusions, it contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *W. Bend Mut. Ins. Co. v. Schumacher*, 844 F.3d 670, 675 (7th Cir. 2016). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Allegations that state legal conclusions or [t]hreadbare recitals of the elements of a cause of action are not entitled to the assumption of truth." *Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 827 (7th Cir. 2015).[2]

ARGUMENT

I. Plaintiffs Have Not Established Standing Or Ripeness.

The Court should dismiss the Complaint, first, because Plaintiffs have not established standing or ripeness. Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "To seek injunctive relief, a plaintiff must show that [it] is under threat of suffering 'injury in fact' that is

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

[2] Unless otherwise stated, internal quotation marks are omitted throughout this memorandum.

concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action . . . ; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The "threatened injury must be certainly impending to constitute injury in fact"; allegations of "possible future injury do not satisfy . . . Art. III." *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990). Where, as here, "the plaintiff is not [itself] the object of the government action," standing "is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562.

Here, the Rule governs DHS personnel and certain aliens. It "neither require[s] nor forbid[s] any action on the part of" Plaintiffs. *Summers*, 555 U.S. at 493. Plaintiffs instead largely rely on speculative, probabilistic injuries caused by independent decisions of third parties not before the Court. Cook County claims that its health care system, CCH, will suffer an injury if aliens in Cook County were to forgo public benefits, relying more on uncompensated emergency health care from CCH. But this theory is too speculative to support standing. First, there is no indication that Cook County will "certainly" suffer a net increase in health expenditures. Cook County alleges that it already provides "$500 million in uncompensated care each year."[3] Compl. for Declaratory and Inj. Relief ¶ 88, ECF No. 1 ("Compl."). Cook County's costs will thus fall to a certain degree as fewer aliens turn to it for uncompensated care. *See, e.g.*, Compl. ¶ 79 (immigrants "will fail to seek testing and treatment" due to the Rule). There is also no indication in the Complaint that any alleged cost increase to Cook County from emergency services will exceed what Cook County will save as a result of the Rule. Additionally, this alleged harm is also speculative since it is unclear whether a material number of aliens that use CCH in particular will necessarily forgo Medicaid benefits, and equally unclear whether a material number of aliens will

[3] Cook County does not state in its Complaint that this figure is limited to emergency services.

rely on uncompensated emergency care from CCH in particular. Indeed, Plaintiffs broadly allege that the Rule will create "tension between immigrant patients and CCH," Compl. ¶ 109, suggesting that immigrants will be deterred from using CCH in general.

In finding Cook County's injury theory sufficient, the Court relied upon three cases: *Gladstone Realtors v. Village of Bellwood*,[4] *City of Chicago v. Matchmaker Real Estate*,[5] and *Department of Commerce v. New York*.[6] But unlike Cook County, the plaintiffs in those cases did not allege injuries based on a long chain of uncertain, intervening events. For example, in *Gladstone*, the plaintiff municipality alleged that the defendants engaged in racial steering within the municipality. 441 U.S. at 94-95. The Supreme Court found that the plaintiff had standing because defendants' steering practices, by definition, "reduce[d] the total number of buyers" in the municipality's "housing market," necessarily reducing "property values" and "diminishing [the] tax base." *Id.* at 110-11. The Seventh Circuit reached the same conclusion in *Matchmaker*, another racial steering case. 982 F.2d at 1095 (Chicago had standing because defendants' "racial steering" created an "increased burden on [Chicago] in the form of . . . an erosion of the tax base."). In both cases, the courts found that the alleged injury (fewer buyers, diminished property values, and thus reduced tax revenue) was a natural consequence of defendants' conduct. Likewise, in *Department of Commerce*, the Supreme Court found that New York's injury theory relied "on the predictable effect of Government action on the decisions of third parties"—namely, immigrants' "predictable" response "to the citizenship question." 139 S. Ct. at 2566. Here, by contrast, it is not certain (or predictable) that (i) a material number of aliens in Cook County will disenroll from Medicaid, (ii) certain of these aliens will then ultimately require emergency services, (iii) the aliens requiring

[4] 441 U.S. 91 (1979).
[5] 982 F.2d 1086 (7th Cir. 1992).
[6] 139 S. Ct. 2551 (2019).

emergency services will turn to CCH in particular, and (iv) the increased expense to Cook County will exceed any cost savings spurred by the Rule.

Cook County also alludes to an organizational standing theory. It claims that the Rule will frustrate its mission and force it to divert funds towards training and education concerning the Rule. Generally, for an organization to have standing, the challenged conduct must "perceptibly impair[]" the "organization's *activities*," with a "consequent drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The alleged "drain on . . . resources" must have "a clear nexus to [a] legally-protected right or interest of the organization." *Keep Chicago Livable v. City of Chicago*, 913 F.3d 618, 625 (7th Cir. 2019). The challenged policy or conduct must "disrupt[]" plaintiffs' activities, and create "additional or new burdens" that make any new expenditure "warranted" and "require[d]." *Common Cause Indiana v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019). Additionally, a plaintiff "must point to a concrete and demonstrable injury to [its] activities; a mere setback to its abstract social interests is not sufficient." *H.O.P.E., Inc. v. Eden Mgmt. LLC*, 128 F. Supp. 3d 1066, 1077 (N.D. Ill. 2015).

Here, Cook County cannot satisfy this standard. Cook County fails to explain how the Rule directly disrupts any of its current *activities*. Thus, its decision to invest resources into countering the purported effects of the Rule was not "warranted" or "require[d]" to rectify any alleged harm to its activities. This investment is voluntary, and constitutes a self-inflicted injury insufficient to establish standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("Respondents cannot manufacture standing merely by inflicting harm on themselves").

ICIRR's standing theory fails for a similar reason. It asserts that its mission is to "provide health and social services to immigrant Illinoisans," and that it channeled resources into creating a new organization—PIF-IL—to counteract the Rule's alleged effects. Compl. ¶¶ 110, 114. But

ICIRR likewise does not allege that the Rule will disrupt any of its current *activities*, thus requiring a diversion of resources into PIF-IL. ICIRR alleges only that the Rule will produce effects inconsistent with ICIRR's ultimate social goals, and that it thus chose to commit resources to educating aliens about the new regulation.[7]

In its PI Order, the Court noted that ICIRR "adduces evidence that its existing programs include efforts within immigrant communities to increase access to care, improve health literacy, and reduce reliance on emergency room care," and that ICIRR spent resources "to prevent frustration of [these] missions." PI Order at 10. But the Court concluded only that the Rule was allegedly inconsistent with the mission of ICIRR's services, not that it interfered with the provision of ICIRR's services. *Common Cause*, which the Court cited, is thus distinguishable. There, the plaintiffs were organizations that helped register voters. *Common Cause*, 937 F.3d at 951. They alleged that the challenged voter registration policy would result in the State improperly "removing eligible voters from the rolls without notice," which would directly inhibit plaintiffs' pre-existing voter registration efforts (since voters registered by the plaintiffs could be removed from the polls). *Id.* Thus, the plaintiffs were "forced to spend resources cleaning up the mess" allegedly created by the new State law. *Id*. The plaintiffs did not simply allege that the State's new policy was incompatible with their abstract goal of increasing voter registration. Here, by contrast, ICIRR does not allege that it created PIF-IL to remedy any disruption to its current programs; ICIRR was not "*require[d]* . . . to change or expand [its] activities" at all. *Id.* at 955 (emphasis added).

"Constitutional ripeness is a doctrine that, like standing, is a limitation on the power of the judiciary" and serves as another prerequisite of justiciability. *Entergy Nuclear Vermont Yankee,*

[7] As a separate matter, for ICIRR, investing money in educating immigrants is "business as usual." *Common Cause*, 937 F.3d at 955. "[A]n organization does not suffer an injury in fact where it expend[s] resources to educate its members and others unless doing so subjects the organization to operational costs beyond those normally expended." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015).

LLC v. Shumlin, 733 F.3d 393, 429 (2d Cir. 2013). Ripeness "prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it." *Id.* Here, the gravamen of Plaintiffs' claims is that individual aliens—not the Plaintiffs themselves—may be erroneously determined as "likely at any time to become a public charge" under the totality of the circumstances test set forth in the Rule. Plaintiffs' claims therefore present the precise circumstance in which ripeness precludes review: resolving questions about the application of "public charge" in the context of an "actual dispute" over application of that ground of inadmissibility is needed to avoid "constructing generalized legal rules" in a "vacuum." *Id.*; *see* 8 U.S.C. § 1252 (providing individuals who have a final order of removal from the United States based on a public charge determination an opportunity to file a petition for review before a federal court of appeals to contest the definition of public charge as applied to them).

Prudential ripeness also counsels against consideration of Plaintiffs' claims. This doctrine is "'an important exception to the usual rule that where jurisdiction exists a federal court must exercise it,' and allows a court to determine 'that the case will be better decided later.'" *In re MTBE Prods. Liability Litig.*, 725 F.3d 65, 110 (2d Cir. 2013). "In determining whether a claim is prudentially ripe," courts examine "whether the claim is fit for judicial resolution" and "whether and to what extent the parties will endure hardship if decision is withheld." *Id.* (cleaned up). Fitness is generally lacking where the reviewing court "would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). Here, Plaintiffs' claims are all premised on hypothesizing about the potential future applications of the Rule to individuals, speculation about the effects of the Rule on individual decision-making, and disagreement with DHS's predictions based on the available evidence. In such a context, "judicial

appraisal . . . is likely to stand on a much surer footing in the context of a specific application" of the Rule, rather than "in a factual vacuum." *Derby & Co, Inc. v. Dep't of Energy*, 524 F. Supp. 398, 408 (S.D.N.Y. 1981) (internal quotations omitted).

In addition, withholding judicial consideration of Plaintiffs' claims will not cause them any significant hardship. With respect to the Plaintiffs bringing this case, the Rule "do[es] not create adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm," and therefore cannot serve as the basis for a ripe claim. *Ohio Forestry Ass'n*, 523 U.S. at 733. Instead, the harms alleged are possible cumulative side effects of third party individuals' decisions to take action not required by the Rule or the Plaintiffs' own decisions to spend money in response to the Rule, so they do not create a ripe facial challenge.

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

Plaintiffs' claims are outside the zone of interests served by the limits of the "public charge" inadmissibility provision in § 1182(a)(4)(A) and related sections. The "zone-of-interests" requirement limits the plaintiffs who "may invoke [a] cause of action" to enforce a particular statutory provision or its limits. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-30 (2014). Under the APA, a plaintiff falls outside this zone when its "interests are . . . marginally related to or inconsistent with the purposes implicit in the statute," *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987), and "the relevant statute" for this analysis "is the statute whose violation is the gravamen of the complaint." *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 529 (1991)); *see Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012).

Plaintiffs fall outside the zone of interests of the public charge inadmissibility statute. At issue in this litigation is whether DHS will deny admission or adjustment of status to certain aliens deemed inadmissible on the public charge ground. It is aliens improperly determined to be

inadmissible, not a municipality or an organization serving other organizations, who "fall within the zone of interests protected" by any limitations implicit in § 1182(a)(4)(A) and § 1183, because they are the "reasonable—indeed, predictable—challengers" to DHS's inadmissibility decisions. *Patchak*, 567 U.S. at 227; *see* 8 U.S.C. § 1252. *Cf. INS v. Legalization Assistance Project of the Los Angeles Cty. Ed'n of Labor*, 510 U.S. 1301, 1304-05 (1993) (O'Connor, J., in chambers) (concluding that relevant INA provisions were "clearly meant to protect the interests of undocumented aliens, not the interests of organizations [that provide legal help to immigrants]," and that the fact that a "regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect").[8]

The Court found that ICIRR fell within the zone-of-interests of the public charge provision because ICIRR's interest in providing health, social, and legal services to immigrants is "consistent with the statutory purpose" of "ensur[ing] that only certain aliens could be determined inadmissible on the public charge ground." PI Order at 13. But there is no precedent indicating that a party comes within a statute's zone-of-interest simply because its interests are *consistent* with a statute's purpose. The Supreme Court has generally noted that a party does not come within the zone-of-interests if its interests "marginally related to . . . the purposes implicit in the statute," and it made

[8] In addressing Justice O'Connor's in-chambers opinion, the Court first noted that the "opinion is both non-precedential and concededly 'speculative.'" PI Order at 14. Although the opinion is non-precedential, it is still informative, and indeed is the only authority (persuasive or otherwise) submitted in this case concerning whether parties such as plaintiffs here are within the zone-of-interests of the relevant INA provision. Further, Justice O'Connor did not state that her conclusion on this point was "speculative." Her opinion addressed a stay motion, and she stated only in "dealing with [a stay] application," she must "predict [how] four Justices would vote," which was a "speculative inquiry." *Legalization Assistance Project*, 510 U.S. at 1304. The Court also noted that this opinion predates certain Supreme Court zone-of-interests decisions. *See* PI Order at 14. But none of these cases undermine the factual statement in the opinion: namely, that relevant INA provisions were "in [no] way addressed to [the] interests" of parties such as the plaintiffs here. *Legalization Assistance Project*, 510 U.S. at 1305.

no special exception for interests marginal to, yet "consistent with," a statute's purposes. *Clarke*, 479 U.S. at 399.

The Court found that Cook County fell within the zone-of-interests based on the Supreme Court's decision *Bank of Am. Corp. v. City of Miami, Florida*,[9] where the Supreme Court held that Miami fell "within the zone of interests protected by the [Fair Housing Act ("FHA")]" based on its alleged injuries of "lost tax revenue and extra municipal expenses." PI Order at 15. But the difference in *City of Miami* is that the FHA, by its terms, "permits any 'aggrieved person' to bring a housing-discrimination lawsuit," and the FHA defines the term "aggrieved person" broadly. 137 S.Ct. at 1303. There is no similar language in the INA suggesting that Congress intended for a similarly broad class of plaintiffs to enforce the public charge provision. Additionally, in *City of Miami*, the Court found that predatory and racially discriminatory lending practices hindered a "City's efforts to create integrated, stable neighborhoods," a harm at the heart of the Fair Housing Act's zone of interests. *Id.* at 1304. Here, in contrast, plaintiffs' interest in increasing alien enrollment in public benefits is directly at odds with the statute's core purpose.

III. The Court Should Dismiss Count One.

Count One alleges that the Rule violates the APA by exceeding DHS's statutory authority. Compl. ¶¶ 140-47. Plaintiffs advance two theories: (1) the Rule's "public charge" definition is contrary to the "unambiguous, plain, and well-settled meaning of that phrase," *id.* ¶ 144; and (2) the Rule impermissibly mandates consideration of an applicant's use of non-cash benefits programs, *id.* ¶ 145. Because neither theory is sound, Count One does not state a plausible claim for relief and should be dismissed.

[9] 137 S. Ct. 1296 (2017).

The Court's analysis of Count One is governed by the *Chevron* framework. *See San Francisco*, 944 F.3d at 790; *accord* PI Order at 15. "At *Chevron*'s first step, [the court] determine[s]—using ordinary principles of statutory interpretation—whether Congress has directly spoken to the precise question at issue." *Coyomani–Cielo v. Holder*, 758 F.3d 908, 912 (7th Cir. 2014). If "Congress has directly spoken to the precise question at issue . . . the court . . . must give effect to the unambiguously expressed intent of Congress," *Indiana v. EPA*, 796 F.3d 803, 811 (7th Cir. 2015) (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984)) (alterations in original) (internal quotation marks omitted), and end the inquiry there, *see Coyomani–Cielo*, 758 F.3d at 912. "If, however, 'the statute is silent or ambiguous with respect to the specific issue,'" *Chevron*'s second step, at which "a reviewing court must defer to the agency's interpretation if it is reasonable," comes into play. *Indiana*, 796 F.3d at 811 (quoting *Chevron*, 467 U.S. at 843-44).

"When interpreting a statute, [the court] begin[s] with the text." *Loja v. Main St. Acquisition Corp.*, 906 F.3d 680, 683 (7th Cir. 2018). "Statutory words and phrases are given their ordinary meaning." *Singh v. Sessions*, 898 F.3d 720, 725 (7th Cir. 2018); *see also United States v. Titan Int'l, Inc.*, 811 F.3d 950, 952 (7th Cir. 2016). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Brumfield v. Chicago*, 735 F.3d 619, 628 (7th Cir. 2013); *see also LaPlant v. N.W. Mut. Life Ins. Co.*, 701 F.3d 1137, 1139 (7th Cir. 2012) ("We try to give the statutory language a natural meaning in light of its context."). And as this Court previously observed, it is "a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." PI

Order at 17 (quoting *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (alterations in original and internal quotation marks omitted)).

A. The Rule Is Consistent With The Statutory Meaning Of "Public Charge."

As the Ninth Circuit recently held the Rule's definition of "public charge" is well within the bounds of the statute. *San Francisco*, 944 F.3d at 799 ("We conclude that DHS's interpretation of "public charge" is a permissible construction of the INA."). The Ninth Circuit made four principle observations: (1) that the word "opinion" is classic "language of discretion," under which immigration "officials are given broad leeway"; (2) that "public charge" is neither a "term of art" nor "self-defining," and is thus ambiguous under *Chevron* as "capable of a range of meanings"; (3) that Congress set out five factors for consideration but expressly did not limit officials to those factors, which gave officials "considerable discretion"; and (4) that Congress granted DHS the power to adopt regulations, by which "Congress intended that DHS would resolve any ambiguities in the INA." *Id.* at 791-92. Following these observations and a comprehensive, detailed account of the history of the "public charge" provision, *id.* at 792-97, the Ninth Circuit had little trouble concluding either that "the phrase 'public charge' is ambiguous," *id.* at 798, or that "DHS's interpretation of 'public charge' is a permissible construction of the INA," *id.* at 799. The same conclusions are appropriate here.

1. The Rule's Definition of "Public Charge" Is Consistent With The INA, Administrative Interpretations, And U.S. Immigration Policy

Related provisions of the INA illustrate that the receipt of public benefits, including non-cash benefits, is relevant to the determination of whether an alien is likely at any time to become a public charge. Congress expressly instructed that, when making a public charge inadmissibility determination, DHS "shall not consider any benefits the alien may have received," 8 U.S.C. § 1182(s), including various noncash benefits, if the alien "has been battered or subjected to

extreme cruelty in the United States by [specified persons]," *id.* § 1641(c); *see also id.* §§ 1611-1613 (specifying the public benefits for which battered aliens and other qualified aliens are eligible). The inclusion of that provision prohibiting the consideration of a battered alien's receipt of public benefits presupposes that DHS will ordinarily consider the past receipt of benefits in making public charge inadmissibility determinations. *Cf. Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1844 (2018) ("There is no reason to create an exception to a prohibition unless the prohibition would otherwise forbid what the exception allows.").

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

The import of the affidavit-of-support provision is clear: To avoid being found inadmissible on the public charge ground, an alien governed by the provision must submit an

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

Moreover, since at least 1948, the Executive Branch has taken the authoritative position that an alien may qualify as a "public charge" for deportability purposes if the alien or the alien's sponsor or relative fails to repay a public benefit upon a demand for repayment by a government agency entitled to repayment. *See Matter of B-*, 3 I. & N. Dec. 323, 326 (BIA), *aff'd*, *id.* at 337 (A.G. 1948). Under that rubric, an alien can be subject to deportation on public-charge grounds based on a failure to repay upon demand, regardless of whether the alien was "primarily dependent" on the benefits at issue. *See id.* Indeed, although the Attorney General and Board of Immigration Appeals concluded that the alien in *Matter of B-* was not deportable as a public charge because Illinois law did not allow the State to demand repayment for the care she received during her stay in a state mental hospital, the opinion makes clear that the alien would have been deportable as a public charge if her relatives had failed to pay the cost of the alien's "clothing, transportation, and other incidental expenses," because Illinois law made the alien "legally liable" for those incidental expenses. *Id.* at 327. That was so even though Illinois was not entitled to recover the sums expended for plaintiff's lodging, healthcare, and food. *See id.*

Finally, the Rule's definition of "public charge" is entirely consistent with Congress's codified statements of U.S. immigration policy. In PRWORA, Congress reiterated our "national

policy with respect to welfare and immigration." 8 U.S.C. § 1601. In relevant part, PRWORA provides: "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes." *Id.* § 1601(1). As a result, "[i]t continues to be the immigration policy of the United States that . . . aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations." *Id.* §§ 1601(2)-1601(2)(A). As the Ninth Circuit had no trouble concluding, "[r]eceipt of non-cash public assistance is surely relevant to 'self-sufficiency' and whether immigrants are 'depend[ing] on public resources to meet their needs.'" *San Francisco*, 944 F.3d at 799 (citing 8 U.S.C. § 1601(1)–(2)).

2. Early Definitions Support the Rule's Definition of "Public Charge"

The Rule's definition of "public charge" is also consistent with its historical statutory meaning. The term has always been understood as one that the Executive Branch could, in its discretion, interpret to encompass individuals partially or temporarily dependent on public support. Indeed, there is longstanding evidence that the term "[p]ublic charge means any maintenance, or financial assistance, rendered from public funds." Arthur Cook *et al.*, Immigration Laws of the U.S., § 285 (1929); *see also* 26 Cong. Rec. 657 (1894) (statement of Rep. Warner) (explaining that under the public charge inadmissibility ground, "[i]t will not do for [an alien] [to] earn half his living or three-quarters of it, but that he shall presumably earn all his living . . . [to] not start out with the prospect of being a public charge"). When Congress originally enacted the public charge ground of inadmissibility, the term "pauper," not "public charge," was in common use for a person so impoverished they would be expected to be permanently dependent on public support. *See, e.g.*, Century Dictionary & Cyclopedia (1911) (defining "pauper" as "[a] very poor person; a person entirely destitute"); *see also Overseers of Princeton Twp. v. Overseers of S. Brunswick Twp.*, 23

N.J.L. 169, 172 (N.J. 1851) (treating "a pauper" and "a person likely to become chargeable" as two separate classes).[10]

An 1828 dictionary defined "charge" as "[t]hat which is enjoined, committed, entrusted or delivered to another, implying care, custody, oversight, or duty to be performed by the person entrusted," or a "person or thing committed to anothers [sic] custody, care or management." *San Francisco*, 944 F.3d at 793 (citing Charge, *Webster's Dictionary* (1828 Online Edition), http://webstersdictionary1828.com/Dictionary/charge). Another contemporary dictionary defined "charge" as "an obligation or liability." *Id.* (citing Stewart Rapaljb & Robert L. Lawrence, *Dictionary of American and English Law, With Definitions of the Technical Terms of the Canon and Civil Laws* 196 (Frederick D. Linn & Co. 1888)).

This definition was also reflected in contemporary judicial opinions. *San Francisco*, 944 F.3d at 793 (citing *In re Day*, 27 F. 678, 681 (C.C.S.D.N.Y. 1886) (defining a "public charge" as a person who "can neither take care of themselves, nor are under the charge or protection of any other person"); *State v. The S.S. "Constitution"*, 42 Cal. 578, 584–85 (1872) (noting that those who are "liable to become a public charge" are "paupers, vagabonds, and criminals, or sick, diseased, infirm, and disabled persons"); *City of Alton v. Madison Cty.*, 21 Ill. 115, 117 (1859) (noting that a person is not a "public charge" if the person has "ample means" of support)). And it is reflected in more recent sources: both the 1933 and 1951 editions of Black's Law Dictionary defined the term "public charge," "[a]s used in" the 1917 Immigration Act, to mean simply "one who produces a money charge upon, or an expense to, the public for support and care"—without

[10] Defendants respectfully disagree with the Court's description of *Overseers* as "repeatedly equating 'paupers' with being 'chargeable, or likely to become chargeable.'" PI Order at 25. *Overseers* consistently treats these two statuses as distinct. *See, e.g.*, *Overseers*, 23 N.J.L. at 178 ("There must, also, be an adjudication, either expressly or by reference to the complaint, that the pauper is chargeable, or likely to become chargeable, to the township.").

reference to amount. *Public Charge*, Black's Law Dictionary (3d ed. 1933); Black's Law Dictionary (4th ed. 1951).

3. *Gegiow v. Uhl* and the Immigration Act of 1917

The original, broad meaning of "public charge" was not refuted or narrowed by the Supreme Court's decision in *Gegiow v. Uhl*, 239 U.S. 3 (1915), on which this Court relied in granting the preliminary injunction motion. PI Order at 18-27. *Gegiow* neither defined "public charge" nor foreclosed Defendants' interpretation of that term. At most, it suggests that public charge inadmissibility determinations be based on an alien's personal characteristics—which is precisely the approach the Rule employs, *see* Rule at 41501 (mandating that individual public-charge inadmissibility determinations must be "based on the totality of the alien's [individual] circumstances").

In *Gegiow*, an immigration official found a group of aliens likely to become public charges, and thus denied them entry, solely because the city to which they were headed (Portland, Oregon) had few jobs available. 239 U.S. at 8-9. Thus, "[t]he single question" in the case was "whether an alien [could] be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." *Id.* at 9-10. The Supreme Court held that such a finding was improper for two reasons, neither relevant here.

The first was that, in the 1907 Immigration Act, the phrase "public charge" appeared within a list that included "paupers," "professional beggars," and "idiots," *id*. at 10. The Court observed that the other "persons enumerated" in the list were "to be excluded on the ground of permanent personal objections." *Id.* And thus it noted that "[p]resumably" the phrase "public charge" was "to be read as generically similar to the others." *Id.*[11] But the close association of "public charge" with

[11] In so holding, the Supreme Court ignored another maxim of statutory interpretation: that each term in a group, while perhaps "to be read as generically similar to the others," must nonetheless be given an

"paupers" and "professional beggars" was a feature peculiar to the 1907 Immigration Act, as amended in 1910, not seen in statutes before or since, and which would later be undone expressly to overcome the *Gegiow* Court's misunderstanding of the term.

The Supreme Court's other ground for decision is likewise irrelevant here: the Court thought that "[i]t would be an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked." *Id*. at 10. Thus, when the Court referred to reliance on "permanent personal objections," it was contrasting an approach centered on the alien's own circumstances with an approach centered on general labor conditions. It would be implausible to attribute to that language, in that context, a holding that an individual alien who will rely on public resources for a significant period, but not necessarily indefinitely, may not be excluded as a public charge. Indeed, the 1999 Guidance, which Plaintiffs seek to reinstate, did not reflect that meaning of the term.

Even if *Gegiow* had defined the term "public charge," which it did not, the Court erred in concluding that Congress approved that definition. 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); NPRM at 51125. 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,"

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independent meaning. *Commodity Trend Serv., Inc. v. CFTC*, 233 F.3d 981, 989 (7th Cir. 2000) (noting "the interpretive canon that all words in a statute should, if possible, be given effect") (citing *Dunn v. CFTC*, 519 U.S. 465, 472 (1997)). Congress thereby made "clear that the term 'persons likely to become a public charge' is *not* limited to paupers or those liable to become such; 'paupers' are mentioned as in a separate class." *Lam Fung Yen v. Frick*, 233 F. 393, 396 (6th Cir. 1916) (emphasis added). Indeed, they *cannot* mean the same thing.

which, if left uncorrected, would "materially reduce[] the effect of the clause" in protecting the public fisc.

Congress agreed. The next year, it amended the Immigration Act to move the public-charge ground of inadmissibility toward the end of the list of exclusions, *see* 1917 Act § 3, so that the *Gegiow* Court's mistaken inference about the phrase's placement in the list would be dispelled. That was how a Senate Report described the amendment: "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 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*"). Courts subsequently understood 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*");[12] *see also United States ex rel. Iorio v. Day*, 34 F.2d 920, 922

[12] Respectfully, this Court erred when it previously suggested that Defendants had misread *Horn*. PI Order at 22-23. In considering whether the habeas petitioner had been afforded a fair immigration hearing, the Court in *Horn* was forced to wrestle with the term "likely to become a public charge" under the 1917 Act. The court was clear:

> The contention that the phrase "persons likely to become a public charge" must by construction mean paupers, or mentally or physically defective, as affecting the ability to earn a livelihood, or persons habitually criminal, is not well taken. The term "likely to become a public charge" is not associated with paupers or professional beggars, idiots, and certified physical and mental defectives, as in Act Feb. 20, 1907, as amended by Act March 26, 1910 (36 Stat. 263), and is differentiated from the application in *Gegiow v. Uhl*, supra.

(2d Cir. 1929) (explaining that in the wake of the 1917 Immigration Act, the public-charge statute "is certainly now intended to cover cases like *Gegiow*"); Cook, Immigration Laws of the U.S., §§ 128-34. *But see Ex Parte Mitchell*, 256 F. 229, 232 (N.D.N.Y. 1919) (declining to give effect to relocation of "public charge" within the 1917 Act).

This Court also discounted the 1917 amendment's significance on the ground that it did not, and could not, shed light on the meaning of the phrase when Congress originally used it in the 19th century. PI Order at 20. That argument proves too much, however, as *Gegiow* itself did not concern the nineteenth century (but rather the 1907 Immigration Act) and thus, on that reasoning, should not be considered either. *See* 239 U.S. at 10. But more importantly, Congress's amendment shows that it believed *Gegiow* to be mistaken as to the term's definition in *any* time period, including the late 19th century, because it had "limit[ed] the meaning" of public charge. S. Rep. No. 64-352, at 5 (1916).

This Court similarly erred in concluding that Congress's amendment showed only that "Congress wanted aliens dependent on government support for *noneconomic* reasons, like imprisonment, to be [subject to the public-charge inadmissibility provision] as well." PI Order at 21. *Gegiow* did not involve imprisonment; it concerned an immigrant with poor job prospects because of the job market in Oregon. 239 U.S. at 8-9. And even as to imprisonment, the later cases on which the Court relied did not require permanent incarceration. *See* PI Order at 21-22 (citing, *e.g., United States ex rel. Medich v. Burmaster*, 24 F.2d 57, 59 (8th Cir. 1928), which held that an alien was likely to become a public charge because he had been incarcerated for 18 months).

Horn, 292 F. at 457. Although this Court was correct that the alien in *Horn* was deemed a "public charge" by virtue of his likelihood of incarceration at the time of entry, PI Order at 23, that does not change the court's assessment of the impact of the 1917 Act's amendments, which was the proposition for which Defendants cited the case.

Similarly, in other post-*Gegiow* decisions, courts held that an alien's reliance on taxpayer support for basic necessities on a temporary or intermittent basis was sufficient to render the alien a public charge. *See, e.g.*, *Ex parte Turner*, 10 F.2d 816, 816 (S.D. Cal. 1926) (family was deportable as persons likely to become public charges where evidence indicated that the family had received "charitable relief" for two months and "public charities were still furnishing some necessaries to [the] family" one month later); *Guimond v. Howes*, 9 F.2d 412, 413-14 (D. Me. 1925) (alien was "likely to become a public charge" in light of evidence that she and her family had been supported by the town twice—once for 60 days and once for 90 days—over the previous two years).

* * *

Defendants easily clear the hurdle of *Chevron* step one. Congress has never defined "public charge," let alone foreclosed the interpretation adopted in the Rule. Instead, Congress has repeatedly and intentionally left the definition and application of the term to the discretion of the Executive Branch. *See San Francisco*, 944 F.3d at 796-97 (finding that "'public charge' does not have a fixed, unambiguous meaning" and that "[i]t is apparent that Congress left DHS and other agencies enforcing our immigration laws the flexibility to adapt the definition of 'public charge' as necessary").

Defendants prevail at *Chevron* step two, at which the Court "must defer to the agency's interpretation if it is reasonable," PI Order at 16 (quoting *Indiana*, 796 F.3d at 811 (quoting *Chevron*, 467 U.S. at 843-44)). The Ninth Circuit held that the Rule "easily satisfies this test." *San Francisco*, 944 F.3d at 799. Because the Rule adopts a reasonable interpretation of the statutory provision, Plaintiffs cannot succeed on their theory that the Rule's definition of "public charge" exceeds DHS's statutory authority.

B. The Plain Meaning Of Public Charge Does Not Require Permanent Receipt Of Government Benefits Or That Such Benefits Be Paid In Cash.

Plaintiffs further allege in Count One that the Rule impermissibly mandates consideration of non-cash benefits programs. Compl. ¶ 145. This theory, too, fails to state a plausible claim.

The Ninth Circuit had no difficulty disposing of this same question: "We see no statutory basis from which a court could conclude that the addition of certain categories of in-kind benefits makes DHS's interpretation untenable." *San Francisco*, 944 F.3d at 799. That court reiterated that PRWORA set forth a "national policy with respect to welfare and immigration," which policy includes in pertinent part: "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes." *Id.* (quoting 8 U.S.C. § 1601, 1601(1)). "PRWORA thus lends support to DHS's interpretation of the INA," which "is a permissible construction of the INA." *San Francisco*, 944 F.3d at 799. This Court should agree.

Nothing in the plain meaning of "public charge" suggests a distinction between non-cash benefits and services and "cash assistance," as Plaintiffs suggest. *Compare* Compl. ¶ 4 *with San Francisco*, 944 F.3d at 799 ("We see no statutory basis from which a court could conclude that the addition of certain categories of in-kind benefits makes DHS's interpretation untenable."). Both types of assistance create an obligation on the part of the public, and both equally relieve recipients from the conditions of poverty. And, as discussed above, Congress's instruction that DHS not consider benefits received by a battered alien indicates that Congress expected DHS to consider past receipt of benefits, including noncash benefits, in other circumstances. *See* Section III(A)(1) *supra*.

C. DHS's Interpretation Is Reinforced By Congress's Unequivocal, Longstanding Delegation Of Authority To The Executive Branch

For the foregoing reasons, the Rule's definition of "public charge," including the consideration of non-permanent, non-cash benefits, is well within the statute's ambit. But the

Court's analysis is made easier by the undisputed, expressed, and consistent delegation of authority by Congress to the Executive in this sphere. Indeed, this was the Ninth Circuit's foremost conclusion when examining the statute. *See San Francisco*, 944 F.3d at 791 ("First, the determination is entrusted to the 'opinion' of the consular or immigration officer. That is the language of discretion, and the officials are given broad leeway.") (footnote omitted). The Ninth Circuit also relied on the fact that "Congress granted DHS the power to adopt regulations to enforce the provisions of the INA," and thereby "intended that DHS would resolve any ambiguities in the INA." *Id.* at 792 (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016)).

The Ninth Circuit was right. The statutory term "public charge" has "never been [explicitly] defined by Congress in the over 100 years since the public charge inadmissibility ground first appeared in the immigration laws." Rule at 41308. Congress implicitly delegates interpretive authority to the Executive Branch when it omits definitions of key statutory terms, thereby "commit[ting] their definition in the first instance to" the agency, *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981), to be exercised within the reasonable limits of the plain meaning of the statutory term, *Chevron*, 467 U.S. at 844. Congress has long recognized this implicit delegation of authority to interpret the meaning of "public charge." *See, e.g.*, S. Rep. No. 81-1515, at 349 (1950) (stating that because "there is no definition of the term [public charge] in the statutes, its meaning has been left to the interpretation of the administrative officials and the courts"). This delegation is reinforced by Congress's directive that the determination be made "in the opinion of the Attorney General [or Secretary of Homeland Security]" or a "consular officer." 8 U.S.C. § 1182(a)(4)(A). The expansive delegation of authority by Congress grants DHS wide latitude to interpret "public charge" within the reasonable limits set by the broad meaning of the term itself.

This delegation is reinforced by the explicit overall delegation of authority by Congress to the Secretary of Homeland Security to "establish such regulations . . . as he deems necessary for carrying out" the INA. *San Francisco*, 944 F.3d at 792 (citing 8 U.S.C. § 1103(a)(1) & (a)(3)). Congress has also provided the Secretary with specific responsibility to carry out the INA and to make public charge inadmissibility decisions, as spelled out in detail in the NPRM and Rule. *See* NPRM at 51124; Rule at 41295.

Congress's comprehensive delegation of interpretive authority has been recognized in precedent dating back to the early public charge statutes. *See, e.g.*, *Ex Parte Pugliese*, 209 F. 720, 720 (W.D.N.Y. 1913) (affirming the Secretary of Labor's authority "to determine [the] validity, weight, and sufficiency" of evidence going to whether an individual was "likely to become a public charge"); *Wallis v. U.S. ex rel. Mannara*, 273 F. 509, 510 (2d Cir. 1921) (deference required even if "evidence to the contrary [is] very strong"). It is also recognized in Executive Branch practice. Administrative decisions have explained that Congress's broad delegation of authority in this area was necessary because "the elements constituting likelihood of becoming a public charge are varied." *Matter of Harutunian*, 14 I. & N. Dec. 583, 588-90 (INS Reg'l Comm'r 1974) (quoting S. Rep. No. 81-1515 at 349 (1950) (holding that alien's receipt of "old age assistance benefits" in California was sufficient to render the alien a "public charge")); *see also Matter of Vindman*, 16 I. & N. Dec. 131, 132 (INS Reg'l Comm'r 1977) (citing regulations in the visa context, and explaining that the "elements constituting likelihood of an alien becoming a public charge are varied . . . [and] are determined administratively").[13]

[13] Plaintiffs themselves rely on the existence of this delegated interpretive authority when they herald the 1999 NPRM as relevant to the meaning of public charge, *see* Compl. ¶¶ 46-48. Indeed, they sought to preserve this prior exercise of delegated interpretive authority by requiring DHS "to keep in place [the] regulatory regime that has governed"—*i.e.*, the "primarily dependent" standard that appeared for the first time in the 1999 Field Guidance and simultaneous 1999 NPRM. *See* Pls. Mem. of Law in Supp. of Mot. for TRO and/or Prelim. Inj. or Stay Pursuant to 5 U.S.C. § 705, Dkt. No. 23-1, at 53.

The long history of congressional delegation of definitional authority over the meaning of "public charge" demonstrates the error in Plaintiffs' claim that Congress has, by choosing not to impose a definition of "public charge" when revising the statute, "affirmed the narrow meaning of public charge and rejected efforts to change it." Compl. at 10. That history cuts in precisely the opposite direction. By its inaction in 1965, 1986, 1990, 1996, and 2013—the occasions Plaintiffs cite, *see id.* ¶¶ 30-33—Congress repeatedly left the definition of "public charge" to the Executive Branch. *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.'"). In no event could this inaction be read as a *withdrawal* of the longstanding delegation to the Executive Branch to exercise definitional authority over the "varied" elements of the meaning of "public charge." S. Rep. No. 81-1515, at 349; *see also San Francisco*, 944 F.3d at 798 ("And no change to § [1182] means that consular officers, the Attorney General, and DHS retain all the discretion granted them in the INA."). Certainly the INS, when it adopted the 1999 Field Guidance and proposed to issue a sweeping new definition of "public charge" through notice-and-comment rulemaking in 1999, did not understand Congress's 1996 action to have altered the statute by withdrawing the long-understood delegation. *See* 1999 NPRM at 28677 ("[T]he proposed rule provides a definition for the ambiguous statutory term 'public charge.'").

At a minimum, the likelihood that Congress intended to preserve the delegation means that, under the circumstances, "[c]ongressional inaction lacks persuasive significance" because competing "inferences may be drawn from such inaction." *Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 863 F.3d 911, 917 (D.C. Cir. 2017). And the more plausible of the competing inferences is that Congress intended for DHS to retain the authority delegated to it to analyze the "totality of the alien's circumstances" to make "a prediction" about the likelihood that an alien will become a

public charge, *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974), including the delegated authority for DHS to adopt further procedures to guide its officers, aliens, and the public at large in understanding the application of the public charge ground of inadmissibility.

IV. The Court Should Dismiss Count Two.

Count Two alleges that the Rule is contrary to law under the APA. For the reasons stated below, Plaintiffs fail to state a claim for which relief may be granted as to violation of the Rehabilitation Act of 1973, PRWORA, IIRIRA, and the Supplemental Nutrition Aid Program ("SNAP"), and each claim should be dismissed.

A. The Rehabilitation Act

Plaintiffs contend that "[t]he Final Rule's public charge definition and weighted circumstances test contravenes Section 504 of the Rehabilitation Act . . . which says that no person with a disability shall, on the basis of disability, 'be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity[.]'" Compl. ¶ 150. However, Plaintiffs omit a critical requirement of § 504: that the denial of services or discrimination be "s*olely* by reason of her or his disability." 29 U.S.C. § 794(a) (emphasis added). Both the Ninth Circuit and the Northern District of California rejected this same Rehabilitation Act argument in their decisions concerning preliminary injunction of the Final Rule. *San Francisco*, 944 F.3d at 799-800 (reversing the Eastern District of Washington's holding that the Final Rule was inconsistent with the Rehabilitation Act); *City & Cty. of San Francisco v. USCIS*, Case No. 19-4717, 2019 U.S. Dist. LEXIS 177379, at *111-12 (N.D. Cal. Oct. 11, 2019) (reversed in part on other grounds by *San Francisco*, 944 F.3d 773).

Both of these courts concluded that the plaintiffs in those cases had no likelihood of success on the merits of their Rehabilitation Act claims because: (1) the INA specifically directs federal immigration authorities to consider "health" in making public charge determinations. *San*

Francisco, 944 F.3d at 800; *San Francisco*, 2019 U.S. Dist. LEXIS 177379 at *111-12. And (2) disability cannot be the sole reason for a denial of adjustment of status under the Rule's totality of the circumstances test.

For the same reasons, Plaintiffs' claim based on the Rehabilitation Act fails. First, the INA explicitly lists "health" as a factor that an officer "shall . . . consider" in making a public charge determination. 8 U.S.C. § 1182(a)(4)(B)(i). "Health" certainly includes an alien's medical conditions, and it is therefore Congress, not the Rule, that requires DHS to take this factor into account. *See*, *e.g.*, *In Re: Application for Temporary Resident Status*, 2009 WL 4983092, at *5 (USCIS AAO Sept. 14, 2009) (considered application for disability benefits in public charge inquiry). A specific, later statutory command, such as that contained in the INA, supersedes section 504's general proscription to the extent the two are in conflict, which they are not. *See*, *San Francisco*, 944 F.3d at 800; *see also e.g.*, *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1353 (10th Cir. 1987) ("[A] general . . . statute, § 504" may not "revoke or repeal . . . a much more specific statute . . . absent express language by Congress[.]" (internal quotation marks omitted).

Second, the Rehabilitation Act imposes a "solely by reason of" standard of causation unique to this statute, *Brumfield v. City of Chicago*, 735 F.3d 619, 630 (7th Cir. 2013), which is "meaningful . . . it means that plaintiffs must show that no other factor besides disability played a role," *Foster v. Arthur Andersen*, L.L.P., No. 96 C 5961, 1997 U.S. Dist. LEXIS 20754 at *16, n.6 (N.D. Ill. Dec. 29, 1997). Plaintiffs' complaint does not even allege that disability can be the *sole* reason for denial of adjustment of status under the Rule. Even if they had made that claim, however, it is clear on the face of the Rule that the Rule does not deny any alien admission into the United States, or adjustment of status, "solely by reason of" disability. *San Francisco*, 944 F.3d

at *800. All covered aliens, disabled or not, are subject to the same inquiry: whether they are likely to use one or more covered federal benefits for the specified period of time. Although an alien's medical condition is one factor (among many) that may be considered, it cannot be dispositive, and is relevant only to the extent that an alien's particular medical condition tends to show that he is "more likely than not to become a public charge" at any time. Rule at 41368; *see also San Francisco*, 2019 U.S. Dist. LEXIS 177379 at *111. Thus, any public charge determination cannot be based "solely" on an applicant's disability.

B. PRWORA

Plaintiffs also contend that the Rule "contravenes the PRWORA by placing qualifications on LPR and immigrant access to Federal public benefits specifically permitted by the PRWORA." Compl. ¶ 151. However, the Rule's consideration of receipt of public benefits in no way limits or prohibits aliens' access to such benefits. Rather, the Rule directs immigration authorities to consider whether aliens have accessed 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, and there is therefore no conflict between the Rule and PRWORA. Because there is no set of facts under which the Rule's post hoc consideration of the use of benefits can actually change any qualified alien's[14] legal entitlement to access those benefits, Plaintiffs' claim fails.

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

C. IIRIRA

Plaintiffs fail to state a claim that the Rule is contrary to IIRIRA, Compl. ¶ 152, because there is no conflict between the statutory and regulatory definitions of public charge. Indeed, Plaintiffs do not allege that there is an explicit conflict between the two but rather that definitions similar to that of the Rule have previously failed to pass into law. As discussed *supra* at 27-28, this Congressional inaction demonstrates only that Congress chose not to proscribe a specific definition of "public charge," and that authority remains in the executive branch to define it in any way that does not conflict with the statute. *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.'"); *see also id.* at 798 ("And no change to § [1182] means that consular officers, the Attorney General, and DHS retain all the discretion granted them in the INA."). Because there is no conflict between the terms of IIRIRA and the Rule, Plaintiffs claim fails.

D. SNAP

Plaintiffs also fail to state a claim that the Rule violates the SNAP statute because the Rule does not consider SNAP benefits as "income or resources[.]" 7 U.S.C. § 2017(b). Section 2017(b) provides that:

> The *value of benefits* that may be provided under [SNAP] shall not be considered income or resources for any purpose under any Federal, State, or local laws, including, but not limited to, laws relating to taxation, welfare, and public assistance programs, and no participating State or political subdivision thereof shall decrease any assistance otherwise provided an individual or individuals because of the receipt of benefits under this chapter.

7 U.S.C. § 2017(b) (emphasis added). The context of this full version, rather than the abbreviated quotation relied on by Plaintiffs, reveals the error in Plaintiffs' argument. The Rule does not consider the "value" of SNAP benefits as "income or resources," only

the *fact of receipt*. Indeed, the Rule specifically prohibits including the amount of SNAP benefits received in the computation of income or assets. *See* Rule at 41375 ("The rule explicitly excludes the value of public benefits including SNAP from the evidence of income to be considered" and "[a]ssets and resources do not include SNAP benefits"). Nothing in § 2017(b) precludes consideration of the fact of receipt of SNAP benefits by other statutes or regulations. *See, e.g.*, 47 C.F.R. § 54.409 (providing eligibility for consumer telephone or Internet subsidies based on fact of receipt of SNAP benefits). Therefore, the Rule does not violate § 2017(b) and Plaintiffs' claim fails.

V. The Court Should Dismiss Count Three.

Count Three of Plaintiffs' Complaint alleges that the Rule is arbitrary and capricious in violation of the APA for various reasons. *See* Compl. ¶¶ 156-69. Count Three should be dismissed because none of the theories alleged in the Complaint plausibly suggest the Rule is arbitrary or capricious.

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

Plaintiffs allege that the Rule is arbitrary and capricious because DHS failed to supply a reasoned analysis for the change from the 1999 Field Guidance. Compl. ¶ 158. But the "fact that DHS has changed policy does not substantially alter the burden in the challengers' favor." *San Francisco*, 944 F.3d at 801. It is well-settled that there is "no basis in the Administrative Procedure Act . . . for a requirement . . . [of] more searching review" when an agency changes its position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). This is particularly true here, where the agency's prior interpretation is nonbinding guidance that could not possibly foreclose DHS from adopting a different reasonable interpretation through notice-and-comment rulemaking. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). As

the Supreme Court explained in *Fox*, all that DHS was required to do to permissibly change course from the 1999 Field Guidance was to acknowledge that the Rule is adopting a policy change, provide a reasoned explanation for the change, and explain how it believes the new interpretation is reasonable. *See generally Fox*, 556 U.S. 514-16. The Rule readily meets these standards, and so DHS is entitled to full deference to its changed interpretations, consistent with its obligation to "consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64 (recognizing agencies receive deference to a "changed . . . interpretation of [a] term").

First, the NPRM and Rule acknowledged that DHS was changing course. In the former, DHS announced it was proposing "major changes," *see, e.g.*, NPRM at 51116, and that these changes included "a new definition of public charge," *id.* at 51158; *see also id.* at 51163. DHS also stated that it would change and "improve upon the 1999 Interim Field Guidance" by changing the treatment of non-cash benefits. *Id.* at 51123. In the Rule, DHS "agree[d] with commenters that the public charge inadmissibility rule constitutes a change in interpretation from the 1999 Interim Field Guidance," Rule at 41319, and repeatedly explained that it was "redefin[ing]" public charge, and adopting a "new definition" of "public benefit" that would be "broader" than before. *Id.* at 41295, 41297, 41333; *see also id.* at 41347.

Second, DHS explained the reasons for the change. DHS described how the "focus on cash benefits" in the 1999 Field Guidance had proved "to be insufficiently protective of the public budget, particularly in light of significant public expenditures on non-cash benefits." NPRM at 51164. DHS presented statistics that reasonably support DHS's conclusion that, under the 1999 Field Guidance, the agency was failing to carry out the principles mandated by Congress that "aliens . . . not depend on public resources to meet their needs," and instead "rely on their own

capabilities" and support from families, sponsors, and private organizations. 8 U.S.C. § 1601; *see also* NPRM at 51160-63 & Tables 10-12; Rule at 41308, 41319 (explaining that the prior guidance "failed to offer meaningful guidance for purposes of considering the mandatory factors and was therefore ineffective").

DHS also adequately explained how the new approach reasonably advances the stated purposes, including by "implement[ing] the public charge ground of inadmissibility consistent with . . . [Congress's goal of] minimiz[ing] the incentive of aliens to attempt to immigrate to, or to adjust status in, the United States due to the availability of public benefits." Rule at 41305 (citing 8 U.S.C. § 1601(2)(B)). Accordingly, the fact that the Rule presents a revised interpretation does not render it arbitrary or capricious. *See San Francisco*, 944 F.3d at 804-05.

B. DHS Adequately Responded to Comments.

Plaintiffs also allege that the Rule is arbitrary and capricious because Defendants did not adequately respond to various public comments. Compl. ¶¶ 159-61. An agency's obligation to respond to comments on a proposed rulemaking, however, is "not 'particularly demanding.'" *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441–42 (D.C. Cir. 2012). "[T]he agency's response to public comments need only 'enable [courts] to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'" *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993). DHS plainly met this standard here.

First, Defendants did not, as Plaintiffs claim, fail to provide "a reasoned response to significant public comments regarding extensive public health, economic, and other economic harms." Compl. ¶ 159. DHS did consider those potential harms and reasonably decided that they did not support abandoning the Rule. In particular, as to the negative impacts from disenrollment in public benefits, the Rule, in fact, provided a detailed discussion of the comments raising

concerns regarding the disenrollment impact and offered a lengthy, reasoned discussion explaining precisely why DHS believed the Rule was justified notwithstanding this potential harm. Rule at 41310-14. As DHS stated, notwithstanding the disenrollment impact, the "rule's overriding consideration, *i.e.*, the Government's interest" in (1) minimizing the incentive of aliens to immigrate or adjust status to obtain public benefits and (2) promoting self-sufficiency of aliens in the United States "is a sufficient basis to move forward." *Id.* at 41312. DHS explained that it is not "sound policy to ignore the longstanding self-sufficiency goals set forth by Congress" because of the potential for disenrollment. *Id*. at 41314; *see also id*. at 41463-41477 (responding to comments about various potential costs and harms, including economic costs and impacts on public health).

Thus, DHS did not ignore potential harms; rather, it found that other policy interests outweighed the interests in avoiding potential disenrollment impacts of the Rule. DHS's decision to move forward notwithstanding potential, unquantifiable harms is a quintessential exercise of the agency's policymaking function and is neither arbitrary nor capricious. *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) ("When . . . an agency is obliged to make policy judgments where no factual certainties exist . . . we require only that the agency so state and go on to identify the considerations it found persuasive."); *Dep't of Commerce*, 139 S. Ct. at 2571 (when an agency must "weigh[] . . . incommensurables under conditions of uncertainty," it is not for courts to ask whether its decision is better than the alternatives."). Plaintiffs may not agree with DHS's weighing of the costs and benefits, but that does not mean that DHS ignored costs or that the Rule is arbitrary and capricious. *See Consumer Elecs.*, 347 F.3d at 303 (the principle "that a court is not to substitute its judgment for that of the agency" is "especially true when the agency is called upon to weigh the costs and benefits of alternative policies").

As for Plaintiffs' allegation that the Rule does not "quantify" harms, the law does not

require an agency to "quantify" all potential effects of a rule in order to comply with the APA. *See Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013) (the "law does not require agencies to measure the immeasurable"); *Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1263 (9th Cir. 2017) (finding agency action was not arbitrary and capricious notwithstanding agency's "failure to quantify" effects). "As predicting costs and benefits without reliable data is a primarily predictive exercise, the [agency] need[s] only to acknowledge [the] factual uncertainties and identify the considerations it found persuasive in reaching its conclusions." *SIFMA v. CFTC*, 67 F. Supp. 3d 373, 432 (D.D.C. 2014).

Next, Plaintiffs' allegation that DHS "failed to make any changes that would reduce disenrollment of individuals who are not subject to the rule" is unsupported and false. Compl. ¶ 161. The Rule explained that DHS made a number of changes to the Rule to mitigate some of the concerns raised regarding disenrollment impacts, such as excluding certain benefits from the scope of the Rule. *Id*. at 41313-14, 41471. This process—full consideration of the issues and the evidence on both sides, the adoption of changes in response, and an articulated statement of the reasons for the agency's ultimate decision—was neither arbitrary nor capricious. *See San Francisco*, 944 F.3d at 800-05 (finding DHS likely to prevail in defending against APA claim that the Rule is arbitrary and capricious because DHS inadequately considered harms).

C. The Rule Retains The Totality Of The Circumstances Standard And Relies On Appropriate Factors.

Plaintiffs further allege that the Rule "overhauls the statutory 'totality of the circumstances' test with a 'weighted factors' test that is vague, arbitrary, unsupported by the evidence and that will inevitably lead to inconsistent, arbitrary and discriminatory public charge determinations." Compl. ¶ 165. But the Rule could not be more clear that it retains the "totality of the circumstances" approach under which Executive Branch officials make individualized

determinations regarding whether "in the opinion of [the officer] at the time of application for admission or adjustment of status, [the alien] is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). In contending otherwise, Plaintiffs disregard the plain text of the Rule.

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

Moreover, Plaintiffs' criticism that certain factors allegedly are "afforded great, functionally prescriptive weight," Compl. ¶ 62, is unsupported by any factual allegations and is incorrect. For instance, as to the medical condition factor, the Rule explained that, because "the public charge inadmissibility determination is made on a case-by-case basis and in the totality of the alien's individual circumstances, an applicant could overcome this heavily weighted negative factor through presentation of other evidence," including "proof of income, employment, education and skills, private health insurance, and private resources." Rule at 41445.

In addition, the Rule's consideration of non-cash public benefits as part of the totality of the circumstances is not arbitrary or capricious. Compl. ¶ 163. Non-cash benefits, like cash-benefits, indicate a lack of self-sufficiency and are therefore relevant to assessing a person's likelihood of becoming a public charge. Rule at 41348-49, 41366. And as discussed above, Congress implicitly recognized that past receipt of non-cash benefits can be considered in determining the likelihood of someone becoming a public charge when it prohibited consideration of past benefits, including non-cash benefits, for certain "battered aliens." 8 U.S.C. § 1182(s). Congress, therefore, understood and accepted DHS's consideration of past receipt of non-cash benefits in other circumstances.

D. Plaintiffs' Additional Allegations Do Not Show Any Arbitrariness Or Capriciousness.

Plaintiffs also allege without explanation that the Rule is arbitrary and capricious "because it rejects Congress' established immigration policy of promoting family unity in favor of policies Congress has already rejected." Compl. ¶ 162. It is unclear what policies Plaintiffs are referring to, but nothing in the Rule rejects a "policy of promoting family unity" or adopts "policies Congress has already rejected." *Id*. On the contrary, the Rule is entirely consistent with U.S. immigration policy, including Congress's direction that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," that "the immigration policy of the United States [is] that aliens within the Nation's borders not depend on public resources to meet their needs," and that aliens must "rely on their own capabilities and the resources of their families, their sponsors, and private organizations." 8 U.S.C. § 1601.

Lastly, Plaintiffs allege that the Rule is arbitrary and capricious because it allegedly discriminates against individuals with disabilities and immigrants of color. Compl. ¶¶ 165-66. As discussed above and below, neither contention is correct. *See* Section IV(A) *supra*; Section VI

infra.

VI. The Court Should Dismiss Count Four.

In Count Four, ICIRR alleges the Rule violates the Equal Protection component of the Fifth Amendment to the Constitution. ICIRR has failed to state an equal protection claim because its complaint includes no well-pled allegation that DHS issued the Rule based on any improper discriminatory motive. ICIRR concedes that the Rule is "facially neutral," Compl. ¶ 183, but claims that the Rule violates the equal protection clause because its alleged purpose is to disproportionately affect a particular racial or ethnic subset of immigrants, *see id*. ¶ 182. In support, ICIRR relies primarily on a handful of stray comments by certain non-DHS, government officials concerning immigration in general, rather than the Rule in particular. ICIRR's allegations are insufficient to establish a plausible equal protection claim.

"[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 265. "Discriminatory intent implies more than mere awareness of consequences." *U.S. v. Moore*, 644 F.3d 553, 558 (7th Cir. 2011). "It means that *the decision maker* selected . . . a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Id.* (emphasis added). Additionally, contrary to ICIRR's assertion, strict scrutiny does not apply simply because a plaintiff alleges a disproportionate impact on a particular racial or ethnic group. "Rational basis review applies to [an] equal protection challenge unless [the plaintiff] can demonstrate that [the government] acted with discriminatory intent." *Id.* at 557; *Washington v. Davis*, 426 U.S. 229, 242 (1976)

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

A narrow standard of review here is particularly appropriate because this case implicates the Executive Branch's authority over the admission and exclusion of foreign nationals, "a matter within the core of executive responsibility." *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018); *id*. at 2419 (highly deferential standard is appropriate "[g]iven the authority of the political branches over admission"). Indeed, this "deferential standard of review" applies "across different contexts and constitutional claims" because "'it is not the judicial role in cases of this sort to probe and test the justifications of immigration policies." *Id*. "A conventional application of" this standard, "asking only whether the policy is facially legitimate and bona fide," would plainly require dismissal of Plaintiffs' equal protection claims because Plaintiffs do not contend there is anything facially discriminatory about the Rule. *Id*. at 2420. But dismissal is also appropriate if the Court were to apply rational basis review to Plaintiffs' claim.

Here, ICIRR's allegations do not suggest that DHS issued the Rule "because of" any alleged "adverse effects upon an identifiable" racial or ethnic group. First, "the [stated] purposes of the" Rule "provide the surest explanation for its" design and implementation. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 275, 279 (1979). The Rule's preamble (spanning roughly 200 pages) thoroughly explains the Rule's non-discriminatory justifications, including the need to facilitate self-sufficiency among immigrants. *See* Rule at 41295 ("DHS is revising its interpretation of 'public charge' . . . to better ensure that aliens subject to the public charge inadmissibility ground are self-sufficient"); Rule at 41308 ("DHS believes [the] broader definition [of public charge] is consistent with Congress' intention that aliens should be self-sufficient. Self-sufficiency is, and has long been, a basic principle of immigration law in this country. DHS believes that this rule

aligns DHS regulations with that principle."). Additionally, the Rule's construction was guided by an extensive notice-and-comment process, following a NPRM that was just under 200 pages long. *See* NPRM, 83 Fed. Reg. 51114 (Oct. 10, 2018). The Rule included a number of changes from the proposed rule in response to public comments. *See*, *e.g.*, Rule at 41297. The Rule's procedural history undermines ICIRR's conclusory assertion that the Rule's design may somehow be attributed to any alleged improper bias.

Second, to show that DHS issued the rule due to improper motives, ICIRR relies almost exclusively on alleged public statements by non-DHS officials that have no express connection to the Rule. The vast majority of the alleged public statements in the Complaint reflect general views on immigration. *See* Compl. ¶¶ 173-76. And the few statements that *arguably* relate to the Rule are consistent with DHS's stated, non-discriminatory justifications for the Rule, including the need to incentivize self-sufficiency. *See* Compl. ¶ 178 ("new immigration rules" must ensure that "those seeking admission into our country must be able to support themselves financially"); Compl. ¶ 180 (aliens may come "*from all the countries of the world*" regardless of "whether they can pay their own way" (emphasis added)). Regardless, "contemporary statements" may be relevant to the question of whether an "invidious discriminatory purpose was a motivating factor," if made "*by members of the decisionmaking body*." *Arlington Heights*, 429 U.S. at 268; *see also Clearwater v. Indep. Sch. Dist. No. 166*, 231 F.3d 1122, 1126 (8th Cir. 2000) ("Evidence demonstrating discriminatory animus in the decisional process needs to be distinguished from stray remarks . . . statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process."). Here, ICIRR relies almost exclusively on statements made by non-DHS personnel,[15]

[15] ICIRR references no specific statement made by any DHS official. Instead, ICIRR vaguely notes that unnamed "senior officials within . . . DHS, including the officials responsible for implementing the" Rule made certain unspecified statements concerning immigration. Compl. ¶ 174. But this allegation is too

and ICIRR provides no explanation for how these statements reveal that *DHS* harbored an improper motive in implementing the Rule. Although ICIRR refers to a statement by Mr. Cuccinelli—who is part of USCIS, a separate component of DHS—this statement provides no indication of why Mr. Cuccinelli supported the Rule. *See* Compl. ¶ 174.

This Court's decision in *Contreras v. City of Chicago* is informative. 920 F. Supp. 1370 (N.D. Ill. 1996). There, the plaintiff—a Chicago-based restaurant—was sanctioned by the City for alleged health code violations. *See id.* 1376-78. The City issued the sanctions after two individuals living across from the restaurant requested that the City investigate the restaurant. *See id.* The plaintiff brought a lawsuit, which included an equal protection claim. In support, the plaintiff claimed that the two individuals who called for the investigation "harbored discriminatory animus against Mexicans." *Id.* at 1377. The Court rejected the plaintiff's equal protection claim. The Court found even if the two individuals requesting the investigation "harbor[ed] discriminatory animus," and "that animus may have motivated" their request, there was no indication that the City "responded to [their request] *because of* their racial animosity rather than merely *in spite of* it." *Id.* at 1403-04. Here, similarly, even if the Court credits ICIRR's conclusory assertion that non-DHS personnel encouraged DHS to issue the Rule due to any alleged improper motive there is no indication that DHS ultimately issued the Rule "because of" this improper motive.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion to Dismiss.

ambiguous to support ICIRR's assertion that DHS was in motivated in any way by discriminatory animus in designing the Rule.

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2020, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Kuntal Cholera
KUNTAL V. CHOLERA