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

REPLY MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' response brief relies, repeatedly, on a faulty assertion: that the Court's amended preliminary injunction order ("PI Order") has resolved many of the issues relevant to Defendants' motion to dismiss. But the PI Order addressed only one of Plaintiffs' four claims, and even then, the Supreme Court and Ninth Circuit have since issued decisions supporting Defendants' motion to dismiss with respect to the claim the Court tentatively resolved in Plaintiffs' favor.

On February 21, 2020, the Supreme Court stayed the Court's injunction, necessarily concluding that Plaintiffs were unlikely to prevail on their claim that the Department of Homeland Security ("DHS") final rule *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292 (Aug. 14, 2019) (the "Rule") is inconsistent with the Immigration and Nationality Act ("INA") public charge ground of inadmissibility. Further, the Ninth Circuit issued a thorough opinion staying injunctions against the Rule issued by two other district courts. The Ninth Circuit correctly noted that, contrary to Plaintiffs' assertion here, the statutory term "public charge" has never been given a precise definition, much less Plaintiffs' preferred definition. Thus, Congress has historically given the Executive Branch broad discretion in construing the term "public charge" in light of changing circumstances.

Following an extensive notice-and-comment process, DHS exercised its discretion and issued the Rule to synchronize the government's enforcement of the public charge ground of inadmissibility with a central policy underlying the immigration laws: to promote "[s]elf sufficiency," 8 U.S.C. § 1601(1), and ensure that "aliens within the Nation's borders not depend on public resources to meet their needs," *id*. § 1601(2)(A). Accordingly, for the reasons set forth herein, and in Defendant's motion to dismiss, the Court should grant Defendants' motion to dismiss.

ARGUMENT

I. Justiciability.

Neither Plaintiff has standing to challenge the Rule. First, none of the alleged injuries to Cook County are "certainly impending." *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990). Plaintiffs' theory of injury for Cook County relies on an elongated causal chain: (i) a material number of aliens must dis-enroll from all public health benefits, even though the Rule exempts receipt of Medicaid benefits for emergency services, individuals under twenty-one years of age, pregnant women, and certain services certain services under the Individuals with Disabilities Education Act, Rule, at 41292, 41363, (ii) a certain number of these aliens must then require emergency care, or contract a communicable disease, and must turn to Cook County's health provider (CCH) in particular, rather than the alternatives, and (iii) any additional costs to Cook County as a result of the Rule must eclipse what Cook County will save as a result of the Rule (*e.g.*, through a decrease in the number of aliens in Cook County who are not self-sufficient, and are thus more likely to depend on uncompensated care from CCH). *See* MTD Br., at 6-7. Importantly, Plaintiffs do not contest that, based on their own allegations, there will be "tension between immigrant patients and CCH," Compl. ¶ 109, and thus aliens are unlikely to rely on CCH for uncompensated care.

In response, Plaintiffs argue that their alleged injury to Cook County relies on "one foreseeable link": "individuals will disenroll from, or decline to enroll in, benefits." Am. Resp., at 5. But Plaintiffs then defeat their argument in the very next sentence, stating that Cook County will suffer injury since this alleged "chilling effect" may "decrease preventative routine treatment," which in turn may result in aliens using "uncompensated care" which will financially harm Cook County. *Id.* This is not "one foreseeable link," rather a sequence of several links, none necessarily foreseeable and each of which must be present for Cook County to suffer any harm. Plaintiffs also

argue that the Rule concedes that local entities may "incur additional costs" due to the Rule. Am. Resp., at 6. But the Rule does not concede that local entities in general—or Cook County in particular—will suffer any *net* financial harm.

Plaintiffs also fail to establish that ICIRR has standing to challenge the Rule. ICIRR relies on an organizational standing theory, which requires ICIRR to establish that the Rule "perceptibly impair[]" ICIRR's "*activities*." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (emphasis added). ICIRR does not have standing simply because it alleges that the Rule is inconsistent with its "social interests," *id.*, and that ICIRR thus "cho[se] to spend money fixing a problem that otherwise would not affect" its concrete activities, *Common Cause Indiana v. Lawson*, 937 F.3d 944, 956 (7th Cir. 2019). Here, Plaintiffs do not allege that the Rule has interfered, or will interfere, with the provision of ICIRR's services. Instead, Plaintiffs claim only that the Rule may produce effects inconsistent with ICIRR's social goals; namely, greater "access to care" and "health literacy." Am. Resp., at 7. Plaintiffs do not dispute that *Common Cause* is thus distinguishable. There, the challenged voter registration law would have caused Indiana to remove individuals from the voter registration rolls that the plaintiffs had worked to register—a direct interference with plaintiffs' services. The Seventh Circuit stressed that plaintiffs had standing because they alleged "real-world impact" not only to their "mission," but also their "lawful work." *Common Cause*, 937 F.3d at 956. ICIRR has not alleged that the Rule has likewise interfered with the delivery of any of its educational or social services, and thus ICIRR does not have standing to challenge the Rule.

Furthermore, even if Plaintiffs can establish Article III standing, they must still "establish that" their alleged injuries fall "within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis" for their claims (here, the INA's public charge

provision). *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). Plaintiffs do not fall within the zone of interests simply because they are "incidentally benefitted" by a narrower reading of the public charge provision. *Am. Fed'n of Gov't Employees, Local 2119 ("AFGE") v. Cohen*, 171 F.3d 460, 469 (7th Cir. 1999). Neither Plaintiff satisfies this standard. First, Cook County's alleged injuries—a possible increase in uncompensated care provided by CCH—is too far attenuated from the public charge provision's zone of interests. The provision applies to aliens who may be denied a change or adjustment of status on public charge grounds. There is no indication that the provision "sought to . . . protect[]" localities from downstream effects of disenrollment from federal benefits, and thus "it cannot reasonably be inferred that Congress intended [for Plaintiffs'] suit[]." *AFGE*, 171 F.3d at 468-69. Cook County, in response, argues that its alleged financial injuries are "related" to the public charge inadmissibility provision. But again, Cook County does not come within the zone of interests simply because it is "incidentally" affected by the Rule's interpretation of the public charge inadmissibility provision.[1]

Plaintiffs then point out that other INA provisions contemplate the involvement of states and localities. But the question is whether Cook County comes within the zone of interests of the specific "*statutory provision* whose violation forms the legal basis for [its] complaint." *Lujan*, 497 U.S. at 883 (emphasis added). The Seventh Circuit rejected an argument similar to Cook County's

[1] In fact, Plaintiffs' theory mirrors an example the Supreme Court provided for an injury that clearly falls outside of a statute's zone of interests: "the failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be" within the zone of interests. *Lujan*, 497 U.S. at 883. Here, although the government does not concede such harm, it would likewise be immaterial even if, as Plaintiffs suggest, a change in the government's reading of the public charge provision will have "an adverse effect" upon Cook County; the provision "was obviously" not "enacted to protect the interests of" localities from a decrease in federal benefit enrollment.

in *AFGE*. There, in response to a zone of interests argument, the plaintiffs "cite[d] language from other sections of the" statute at issue, but the Seventh Circuit noted that it was "not convinced by this argument" since there was no indication that the plaintiffs' injury fell within the zone of interests of the specific provision underlying their claim. *AFGE*, 171 F.3d at 470.

ICIRR's alleged injury—its choice to spend resources in response to the Rule—likewise does not come within the public charge inadmissibility provision's zone of interests. Plaintiffs fail to address Justice O'Connor's chambers opinion, which states that relevant INA provisions were "clearly meant to protect interests of undocumented aliens, not the interest of organizations [that provide legal help to immigrants]," and thus these organizations lack standing to challenge a regulation even if it "effect[s] the way" these organizations "allocate[] [their] resources." *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). Plaintiffs, by contrast, present no authority—persuasive or otherwise—that directly addresses the issue here. Instead, Plaintiffs first argue that ICIRR is the type of organization that can be expected to police the interests found within the immigration laws. *See* Am. Resp., at 9. But Plaintiffs cite to no case suggesting that a party comes within a statutory provision's zone of interests simply because it is "expected" that the party would try to enforce it. Indeed, it is expected that civic organizations with a professed interest in government compliance with all laws would seek to enforce any and all laws—but Plaintiffs surely would not argue that these civic organizations come within the zone of interests of all statutes. Plaintiffs also contend, again, that the Court must look to the "immigration laws as a whole." Am. Resp., at 9. But once more, the Court must consider the specific provision invoked, and there is no indication that ICIRR's alleged interest in conserving its resources is the type of interest "sought to be protected" by the public charge provision. *Lujan*, 497 U.S. at 883.

II. Count One.

All agree that, to dismiss Count One, the Court need only find that section 212(a)(4) of the INA, 8 U.S.C. § 1182(a)(4), is silent or ambiguous on the definition of "public charge" (*Chevron* step one) and that Defendants' interpretation is reasonable (*Chevron* step two). Far from "dead on arrival," Am. Resp. at 10, Defendants' motion demonstrated thoroughly, and at length, why Count One should be dismissed, *see* MTD Br. at 13-29. Plaintiffs' arguments to the contrary, addressed below, do not save that claim.

Plaintiffs cast some of Defendants' arguments as "new." Am. Resp. at 13-19. But the first of those ostensibly new theories is that the Rule's definition of "public charge" is "permissible," *id.* at 13, which is what Defendants have argued all along. *See, e.g.*, Opp'n to Mot. for PI (ECF No. 73) § II.C.1. ("The Rule is Consistent with the Plain Meaning of 'Public Charge'"); *id.* at 22 (arguing that the Rule's definition is appropriate given the "expansive delegation of authority by Congress" which "grants DHS wide latitude to interpret 'public charge' within the reasonable limits set by the broad, plain meaning of the term itself"). The second ostensibly new theory is that the Rule's definition comports with "broad policy considerations," including the 1996 amendments to the INA. But again, those amendments have been cited from the beginning. *Id.* at 4, 28, 34.

What *is* new, since the Court last addressed these issues, is that two courts of appeal and the Supreme Court (twice) have agreed with Defendants that Plaintiffs' challenge is likely to fail. The "stay order" assailed at length by Plaintiffs, Am. Resp. at 13, is in fact a 73-page published decision from the U.S. Court of Appeals for the Ninth Circuit—the only appellate opinion to address in depth the issues now before this Court. *See generally San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). Plaintiffs may disagree with that decision, but they cannot trivialize it.

A. The Rule's Definition of "Public Charge" is a Reasonable Interpretation of an Ambiguous Statutory Provision.

1. *Gegiow v. Uhl* does not support Plaintiffs' interpretation of "public charge," and indeed, the Immigration Act of 1917 undermines it.

Plaintiffs lead with *Gegiow v. Uhl*, 239 U.S. 3 (1915), on which this Court relied heavily in granting the preliminary injunction. *See* Am. Resp. at 10-13; Am. PI Order, ECF No. 106 at 18-27. Defendants have thoroughly debunked Plaintiffs' reliance on that case, *see* MTD Br. at 20-24, but will reiterate three points here. First, everything that Plaintiffs would take from *Gegiow* is, at most, dicta. "The 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." *Gegiow*, 239 U.S. at 9-10.

Second, the sole textual basis on which the Court held that aliens must be judged by their individual circumstances was the proximity of "public charge" to "paupers" and "professional beggar" in the statute. Those terms all connoted "permanent *personal* objections." *Gegiow*, 239 U.S. at 10 (emphasis added). And because the question was whether individual or environmental circumstances governed the public charge analysis, the key word is "personal," not "permanent." *Gegiow* never purported to address whether permanence was required to be a public charge.

Third, Congress acted immediately to sever the connection between "public charge," "pauper," and "professional beggar," thus eviscerating the sole ground on which *Gegiow* stood. *See* Immigration Act of 1917, 64th Cong. ch. 29 ("1917 Act") § 3, 39 Stat. 874, 876 (moving "public charge" down the list of inadmissible classes of aliens, away from "pauper" and "public charge," with no other change). Although the history of that amendment shows that this was meant to overrule *Gegiow*,[2] the Court need not resolve the Parties' dispute over that history. There is no

[2] *See* Letter from Sec. of Labor to House Comm. on Immig. and Naturalization, H.R. Doc. No. 64-886, at 3 (Mar. 11, 1916); S. Rep. No. 64-352, at 5 (1916); H.R. Doc. No. 64-886, at 3-4 (1916);

other, plausible explanation for moving the term "public charge" away from "pauper" and "professional beggar," other than to remove any gloss that "public charge" might have taken from those terms. Certainly, Plaintiffs have offered no such explanation.

Plaintiffs argue that, after *Gegiow*, Congress repeatedly "reenacted the 'public charge' provision" while "retaining the statutory term without change." Am. Resp. at 11 (citing PI Op. at 27-28). But the language from *Gegiow* on which plaintiffs rely stated that "public charge" took meaning from its surrounding terms. So reenacting the Immigration Act with "public charge" moved away from those terms would, on the reasoning of *Gegiow*, be a relevant "change." It was not, as the Court previously put it, just "some change in 1917." Am. Resp. at 11 (quoting Hr'g Tr., Dkt. No. 109 at 28). At a minimum, the 1917 amendment eliminated *Gegiow* as a waypoint for discerning the historical meaning of "public charge," as the only support for its interpretation was immediately removed.[3]

Any suggestion that Congress has implicitly adopted *Gegiow*'s alleged definition of "public charge" is furthered undermined by Congress's subsequent actions. As Defendants explained in their Motion to Dismiss, *see* MTD Br. at 2, 26-28, prior to enacting the INA, the Senate Judiciary Committee undertook a comprehensive review of the United States' immigration laws. In its seminal report following that review, the Committee recognized that "[d]ecisions of the courts have given varied definitions of the phrase 'likely to become a public charge,'" S. Rep. No. 81-1515, 347, 349 (1950), and that "different consuls, even in close proximity with one another, have enforced [public charge] standards highly inconsistent with one another," *id.* at 349.

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).

[3] Indeed, in the 1917 Immigration Act, in the list of excluded classes, the public charge ground follows "skilled or unskilled" "contract laborers," underscoring Congress's intent that the public charge ground not be limited by its association with neighboring grounds. 1917 Act § 3.

The report 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." *Id.* Far from mandating Plaintiffs' definition of public charge, the report concluded that the public charge inadmissibility determination properly "rests within the discretion of" Executive Branch officials." *Id*.

The INA, enacted shortly thereafter, followed that recommendation, declining to define the term "public charge" and making clear that the public charge determination is to be made "in the opinion of" the relevant Executive Branch official. This history highlights the defining feature of Congress's approach to the public charge ground of exclusion: *i.e.*, its repeated and intentional decision to leave the definition and application of the public charge ground to the discretion of the Executive Branch.

Plaintiffs say that judicial opinions following *Gegiow* merely recognized "an expansion in the *types* of conditions that could render an applicant a public charge—from primarily 'sanitary' conditions to economic ones as well." Am. Resp. at 12. That argument makes little sense. *Gegiow* itself was about economic conditions; the question was merely whether individual or market conditions should govern the public charge determination. Neither case cited by Plaintiffs, *see* Am. Resp. at 12, says anything about "sanitary" versus "economic" conditions. Instead, they both clearly describe the effect of the 1917 amendment on the meaning of "public charge." In *Ex Parte Horn*, for example:

> 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.

Horn, 292 F. 455, 457 (W.D. Wash. 1923). Thus, the exact argument that Plaintiffs make here, which was previously accepted by this Court, is "not well taken" in light of the 1917 amendment. *Id.* The second case cited by Plaintiffs, *Iorio v. Day*, 34 F.2d 920 (2d Cir. 1929), also explained how the "transposition" of "public charge" in 1917 clarified its meaning and that the 1917 Act was "intended to cover cases like *Gegiow*." *Id.* at 922.

Finally, Plaintiffs deny that "public charge" and "pauper" must mean different things because they are separate terms in the statute. Am. Resp. at 12-13. Putting aside that that *is* an accepted maxim of statutory interpretation, *see* MTD Br. at 21 n.11 (collecting cases), and even assuming that there is "overlap" between the two terms, Am. Resp. at 13 (citing *Iorio*, 34 F.2d at 922), Plaintiffs' argument still falters for the reasons stated above. They insist that "the common thread that links these terms remains that "[t]he persons enumerated in short are to be excluded on the ground of *permanent personal objections accompanying them*." Am. Resp. at 13 (citing *Gegiow*, 239 U.S. at 10) (emphasis added by Plaintiffs). But they forget that the "thread" was cut by Congress in 1917 when it moved "public charge" away from "pauper" in the statute.

Ultimately, Plaintiffs overstate *Gegiow* and overlook the 1917 amendment that abrogated it. *Gegiow* neither supplies an unambiguous meaning of "public charge" nor forecloses the Rule's interpretation as unreasonable. *See* MTD Br. at 20-24. And the 1917 amendment eviscerated any help *Gegiow* might otherwise have offered.

2. The Rule's interpretation of "public charge" is valid.

Plaintiffs attack the "new" argument that the Rule's definition of "public charge" is "permissible" under the INA, which is what Defendants have argued from the beginning. *Compare* Am. Resp. at 13-16 *with* Opp'n to Mot. for PI at 13-24. Plaintiffs try desperately to criticize the 73-page published opinion issued by the Ninth Circuit in *San Francisco*, to no avail.

First, they fault the Ninth Circuit for paying "insufficient heed to *Gegiow*, which interpreted the statutory language to provide *unambiguously* that 'public charge' encompasses only persons who . . . would be substantially, if not entirely, dependent on government assistance on a long-term basis." Am. Resp. at 14 (quoting PI Op. at 19). Plaintiffs cite *Brand X* for the proposition that a court's prior judicial construction trumps an agency's if the judicial holding "follows from the unambiguous terms of the statute." *Id.* (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)). But contrary to Plaintiffs' argument, *Gegiow* came nowhere close to holding that "public charge" was unambiguous. *See supra* Section II.A.1. If anything, the fact that the Court resorted to neighboring terms for context proves that "public charge" *is* ambiguous.

Plaintiffs suggest that the *Gegiow* Court called "the interpretation proposed by DHS . . . 'an amazing claim of power.'" Am. Resp. at 14 (quoting *Gegiow*, 239 U.S. at 10). That passage comes from dicta at the end of the Court's opinion, in which the Court also reasoned that the structure of the 1907 Act foreclosed a determination based on one city's labor market.[4] The Court did not address—let alone opine on—anything like the Rule's definition. More importantly, however, the "statutory text" to which Plaintiffs claim the Rule is "insufficiently solicitous," Am. Resp. at 14, was deliberately changed two years later.

[4] Section 1 of the Act allowed the President, upon finding that passports from another country were "being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein," to refuse entry to citizens of those countries. 1907 Act, § 1, 34 Stat. at 898. Because this determination had to be based on *national* labor markets, the Court reasoned that it would be "an amazing claim of power" if immigration commissioners were able to use the "guise of a [public charge] decision" to make the determination on a local level. But because the Court had already ruled, for the textual reasons above, that "public charge" connoted a *personal* (not market-based) objection, the question of national versus local labor markets was unnecessary to the Court's holding.

Plaintiffs then argue that the word "opinion" in the public charge provision gives DHS authority to *apply* "public charge" but not to *define* it. Am. Resp. at 15. The Ninth Circuit disagrees. Based on the "opinion of" language and the regulatory authority of DHS to enforce the public charge provision, the Ninth Circuit held that DHS was "given broad leeway" to "resolve any ambiguities in the INA." *San Francisco*, 944 F.3d at 791, 792 (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016)). That is a sensible conclusion, based on well understood principles of administrative law. *See* MTD Br. at 26-28.

Finally, Plaintiffs make a non-delegation argument. But their depiction of a rule with "no limit," in which DHS could "pick and choose" among "myriad forms of government goods and services" conferred "for any duration, and in any amount," is nothing like the Rule at issue in this case. Am. Resp. at 16. DHS has promulgated a multifactor, totality-of-the-circumstances framework that is, indeed, cabined by the intelligible principles in 8 U.S.C. § 1182(a)(4)(A).[5] The question is whether that Rule—not a hypothetical contrived by Plaintiffs—survives scrutiny under *Chevron*. It does.

3. The "policy considerations" dismissed by Plaintiffs are, in fact, statutory provisions that bolster the Rule's interpretation.

Plaintiffs cast aside as mere "policy considerations" several provisions of the INA, and other statutes, that bolster the Rule's definition of "public charge." Am. Resp. at 16-19.

The fact that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105, "didn't mark a significant departure in terms of what 'public charge' has meant" or "change[] fundamentally the underlying term," Am. Resp.

[5] The statute provides, as intelligible principles, five nonexclusive factors that must be considered by DHS and a sixth, optional factor: affidavits of support. *Id.* § 1182(a)(4)(B). "The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion). It has here.

at 17 (quoting Hr'g Tr. (ECF No. 109) at 18-19, 20-21) is of no moment. For the reasons above, there was no unambiguous definition *before* 1996 that would have foreclosed the Rule's current definition.[6] Thus, no change in 1996 was required. Instead, PRWORA merely reaffirmed that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes" and that "[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." 8 U.S.C. §§ 1601(1), 1601(2)(A).

Plaintiffs argue that the "exception" in 8 U.S.C. § 1182(s) "cannot establish the rule." Am. Resp. at 17. Defendants never argued that it did. *See* MTD Br. at 15-16. The question presented by Count One is whether Congress unambiguously foreclosed the Rule's definition. That Congress excepted *certain* aliens' receipt of public benefits presupposes that Congress would ordinarily have expected DHS to consider such receipt of benefits in making public charge inadmissibility determinations. This shows, at a minimum, that the term "public charge" does not unambiguously exclude consideration of non-cash benefits. That is enough for Defendants to prevail.

Plaintiffs also dispute the import of the affidavit of support requirements, under section 213A of the INA, 8 U.S.C. 1183a, added by Congress in 1996. *See* Mot. at 16-17. Defendants are not trying to "stretch" this provision "[in]to a general lesson about the meaning of 'public charge.'" Am. Resp. at 18. The point, again, is that Congress has not unambiguously foreclosed the Rule's definition. These provisions support that point: Congress provided that the mere *possibility* that an alien might obtain *any* unreimbursed, means-tested public benefits in the future was sufficient to

[6] The proposed rule accompanying the 1999 Field Guidance, with which Plaintiffs take no issue, itself said that "the proposed rule provides a definition for the ambiguous statutory term 'public charge.'" *Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28676, 28,677 (May 26, 1999).

render that alien inadmissible on the public charge ground, regardless of the alien's other circumstances. That is at least consistent with a Rule that sets a much higher bar for a "public charge." Certainly it does not foreclose such a rule.

Plaintiffs turn this argument on its head by arguing that the affidavit of support required of *some* aliens only means that affidavits are not required of *all* aliens. Am. Resp. at 18. Of course they are not, and the Rule does not impose on all aliens the equivalent of the affidavits of support. The point is that if some aliens can be considered inadmissible on the public charge ground merely because they might cost the public any amount of unreimbursed means-tested public benefit, then the Rule's definition—which requires receipt of one or more public benefits for more than 12 months in the aggregate within any 36 month period—cannot be contrary to the unambiguous meaning of "public charge," which Plaintiffs must show in order to prevail.[7]

4. The Rule survives scrutiny at *Chevron* step two.

Defendants have shown, not just that the term "public charge" is ambiguous, but that the Rule adopts a definition that falls comfortably within that ambiguity. *See* MTD Br. at 13-29. None of Plaintiffs' arguments in opposition, addressed above, alters that conclusion. The Ninth Circuit held that the Rule "easily satisfies this test." *San Francisco*, 944 F.3d at 799.

Plaintiffs refer to "independent reasons" why the Rule fails at *Chevron* step two, but offer only one: that the Rule does not adopt a true totality of the circumstances framework. Am. Resp. at 20. Instead, Plaintiffs suggest, it *automatically* considers an alien who meets the 12/36 standard a "public charge." *Id.* But while the Rule's definition of a "public charge" is an alien who receives

[7] Plaintiffs argue separately that the Rule violates "other aspects of the affidavit-of-support provision." Am Resp. at 18-19. They suggest that Defendants have "dismantled" the "Congressional solution" in IIRIRA of "allowing admissibility on the promise of repayment." Am. Resp. at 19. But the Rule does nothing to undermine admissibility under the affidavit provisions. And its definition of "public charge" is faithful to those provisions, which treat as "public charges" anyone who poses a risk of *any* unreimbursed benefit consumption.

one or more public benefits, as defined in the rule, for more than 12 months in the aggregate within any 36-month period, the framework for determining whether an alien is likely to meet that threshold is anything but automatic. The past receipt of public benefits above the 12/36 threshold, for example, is but one heavily weighted negative factor under the Rule's totality of circumstances framework. Rule at 41298-99, 41504.

Because the Rule adopts a reasonable interpretation of an ambiguous statutory provision, Plaintiffs cannot succeed on their theory that the Rule's definition of "public charge" exceeds DHS's statutory authority. Count One should be dismissed.

III. Count Two.

A. Plaintiffs fail to state a claim that the Rule is contrary to the Rehabilitation Act.

Plaintiffs assert that the Rule violates the restrictions of section 504 of the Rehabilitation Act because it takes into consideration the health status and consequently the disability status of applicants, making disability a "but for cause" of the denial of admission or adjustment of status. Am. Resp., at 21-22. Plaintiffs, however, misunderstand the applicable standards of the Rehabilitation Act. As explained in detail in Defendants' motions to dismiss, *see* MTD Br. at 29-31, the Rule does not conflict with section 504 because disability cannot be the *sole* reason for denial of adjustment of status under the totality of the circumstances test required by the public charge statute. First, both the public charge inadmissibility statute and the Rule require any public charge inadmissibility assessment to be based on a totality of the circumstances analysis in which no one factor can be dispositive (except that the lack of a required sufficient affidavit of support forms an independent basis upon which an alien can be found inadmissible on the public charge ground. 8 U.S.C. 1182(a)(4)(C) and (D)). By definition such an analysis does not violate the "solely" standard of § 504. *See, e.g., 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) ("The additional word 'solely' in the Rehabilitation Act's causation requirement is a meaningful difference: it means that plaintiffs must show that no other factor besides disability played a role" in the denial of a benefit.).

Second, contrary to Plaintiffs' assertion, health and disability are not "negative factors *per se*," Am. Resp., at 22, in a public charge inadmissibility determination, but instead are only weighed negatively to the extent that an alien's particular disability tends to show that he is "more likely than not to become a public charge" at any time, Rule at 41368. Indeed, the Rule explicitly states that if "there is no indication that such disability makes the alien more likely to become a public charge, the alien's disability will not be considered an adverse factor in the inadmissibility determination." *Id.* Therefore, it is an alien's future likelihood of receiving public benefits over the designated threshold, and not his health or disability itself that determines whether an alien is inadmissible under the public charge ground of inadmissibility, and such a consideration does not run afoul of section 504's prohibition. *See Brumfield v. City of Chicago*, 735 F.3d 619, 630 (7th Cir. 2013) ("The Rehabilitation Act protects qualified employees from discrimination solely by reason of disability, meaning that if an employer fires an employee for any reason other than that she is disabled—*even if the reason is the consequence of the disability*—there has been no violation of the Rehabilitation Act.") (emphasis added).

The INA also requires Defendants to consider the health of aliens as part of the public charge inadmissibility determination, and, as acknowledged by the Northern District of California and the Ninth Circuit in related cases, Plaintiffs are simply incorrect that the Rule violates section 504 because it may assign negative weight to an applicant's health (including any disability that impacts the alien's ability to work, go to school, or support himself) in making that public charge inadmissibility determination,. *See San Francisco*, 944 F.3d at 799-800; *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). Even if the Rule did make "the presence or absence of a disability. . . the dispositive test of the health factor" as Plaintiffs allege, Am. Resp., at 22, which it does not, the Rule would not violate the Rehabilitation Act because health is only one of the numerous factors that must be considered in making the statutorily mandated public charge inadmissibility determination in the totality of the circumstances. *See* 8 U.S.C. § 1182(a)(4)(B). Moreover, in order to meaningfully assess the contribution of health status to an alien's likelihood of becoming a public charge at any time in the future, Defendants must necessarily consider both good health and ill health, even if that requires consideration of a disability that impacts the alien's ability to work, go to school or care for himself. Additionally, the Rule's consideration, in the totality of the circumstances, of an applicant's receipt of Medicaid or lack of private health insurance does not violate section 504. The Rule equally weighs these factors for every applicant as part of the totality of the circumstances analysis.

Consequently, Plaintiffs cannot state a claim that the Rule is contrary to law under the Rehabilitation Act.

B. Plaintiffs fail to state a claim that the Rule is contrary to PRWORA.

Plaintiffs attempt to create a contradiction between PRWORA and the Rule where none exists. There is simply no direct conflict between the ability to seek benefits granted to some qualified aliens under PRWORA and Defendants' consideration of aliens' receipt of public benefits in determining whether those aliens are likely to become public charges. Qualified aliens may or may not choose to pursue such benefits for a variety of reasons, including but not limited to the impact that they could have on a public charge inadmissibility determination. The Rule,

which reflects DHS' statutory obligation to consider for purposes of a public charge inadmissibility determination, among other mandatory factors, an applicant's "assets, resources, and financial status, 8 U.S.C. § 1182(a)(4)(B)(i)(IV), in no way undermines the statutory authority of agencies to provide such benefits nor any qualified alien's ability to pursue them. Nor is there any conflict between PRWORA and the Rule created by Congress's policy statements as expressed in 8 U.S.C. § 1601. PRWORA's stated aim is to discourage the reliance of aliens on public benefits, *id.*, and both the Rule's consideration of the use of such benefits in making a public charge inadmissibility determination and the reduced but not eliminated availability of public benefits for qualified aliens permitted by PRWORA are consistent with that goal. Finally, Plaintiffs are factually incorrect that eligibility to receive public benefits alone makes an alien likely to be found inadmissible as a public charge. The Rule is clear that DHS does not consider, in the totality of the circumstances, whether the applicant is simply eligible for public benefits as defined in the rule. Rather, DHS will only consider the application for, certification for receipt, and receipt of public benefits as defined in the rule. *See* 8 CFR 212.22(b)(4)(i)(E).

C. Plaintiffs fail to state a claim that the Rule is contrary to the SNAP statute.

Plaintiffs contend that the Rule improperly considers the "value" of SNAP benefits received by aliens as "income or resources" because 1) benefits have an established minimum monetary value, 2) the stated purpose of the Rule is to reduce federal expenditures on public benefits, and 3) the receipt of 12 months of SNAP benefits over a 36 month period is deemed sufficient to render an alien a public charge. Am. MTD Resp., at 25-26. None of these arguments can state a claim for which relief may be granted.

First, Plaintiffs' allegation that SNAP benefits have a defined lower limit does not establish that the Rule considers the value of the benefits as income or resources. If there were no defined

limit to the benefits or the limit was set at any other amount, there would be no effect on the operation of the Rule. Additionally, the Rule explicitly prohibits Defendants from including the value of SNAP benefits received when calculating the income or assets of any alien applicant. Rule at 41375. Nor does the Rule's alleged purpose of reducing overall federal expenditures on SNAP benefits to "low-income individuals" suggest that the value of SNAP benefits being received by alien applicants for admission are in any way attributed to those aliens as income or resources. Finally, Plaintiffs argue that the Rule "explicitly considers the value" of SNAP benefits received by defining the receipt of 12 months of SNAP benefits within a 36 month period as "sufficient" to meet the definition of public charge. Am. Opp. at 26. First, this definition in no way attributes receipt of SNAP benefits to aliens as income or resources. Second, the fact that receipt of *any* amount of SNAP benefits for 12 months in a 36 month period satisfies the definition of "public charge" does not indicate that the *specific* amount of SNAP benefits received over that period is relevant to that determination. Instead, the fact that an alien is reliant on the government to satisfy a basic requirement of daily life over that period is sufficient to meet the definition of public charge. It should also be noted that satisfying the definition of public charge based on past use of benefits is not dispositive of the prospective determination that an alien will likely be a public charge in the future, but rather is only one factor in the totality of the circumstances.

Plaintiffs' reliance on *Gooderham v. Adult & Family Servs. Div.*, 667 P.2d 551 (Ore. App. 1983) is misplaced. In that case the regulation at issue sought to determine the amount of food assistance available to individuals based on the value of SNAP benefits to which they would be entitled. *Id.* at 556. In other words SNAP benefits were explicitly considered as resources chargeable to individuals and other aid available to them was consequently reduced. *See id*. The regulation was invalidated on that basis. *Id.* at 557-558. The Rule is easily distinguishable; the

value of SNAP benefits is prohibited from being imputed to aliens in any calculation of income or resources.

Plaintiffs' final argument also ignores the plain language of the SNAP statute. Defendants' motion to dismiss pointed out that the fact of receipt of SNAP benefits is used by other regulations to determine eligibility for certain programs. MTD Br., at 33. Plaintiffs' opposition suggests that SNAP can be relied on if the program using it is in line with the purposes of the SNAP statute as Plaintiffs understand them. Am. Resp., at 27. This limitation is completely baseless and unsupported by the statutory text. Section 2017 explicitly states that "value of [SNAP] benefits that may be provided . . . shall not be considered income or resources for *any purpose*" without providing any further limitation. 7 U.S.C. § 2017(b) (emphasis added).

IV. The Court Should Dismiss Count Three.

A. The Rule is Not Arbitrary or Capricious.

Plaintiffs have failed to rebut Defendants' showing that Count Three should be dismissed. In particular, Plaintiffs' argument that DHS "declined to address" harms that may result from the Rule is plainly incorrect. Am. Resp., at 28. As Plaintiffs' many citations to the Rule demonstrate, *id*. at 28-29, DHS extensively discussed those harms and explained why those harms did not justify abandoning the Rule. As Defendants explained in their motion, *see* MTD Br., at 35-37, DHS reasonably weighed those inherently uncertain possible costs against difficult-to-measure policy benefits. The APA requires nothing more. *See San Francisco*, 944 F.3d at 800-05; *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019) (where the evidence calls for "value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty" the decisionmaker must only "consider the evidence and give reasons for his chosen course of action"). DHS even took steps to mitigate the harms by excluding consideration of the receipt certain public

benefits from the Rule's coverage. *See* Rule at 41384-85. That fact alone distinguishes the cases on which Plaintiffs rely.

In arguing to the contrary, Plaintiffs misstate the law and DHS's conclusions. They label DHS's actions arbitrary because DHS predicted some reduction in benefits usage but allegedly failed to "grappl[e] with" the public health effects that could result from it. Am. Resp., at 28. But under settled law, DHS only had to explain its uncertainty and its reasoning, which DHS did. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 104-106 (1983). And, in any event, "DHS not only addressed th[o]se [public health] concerns directly, it changed [the] Final Rule in response to the[m]." *San Francisco*, 944 F.3d at 804.

None of the decisions cited by Plaintiffs suggest otherwise. In *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050 (D.C. Cir. 1986), a statute specifically required the agency to "consider" a particular factor but the "entire administrative record contain[ed] only two fleeting references to" that factor. *Id*. at 1055. Here, in contrast, DHS extensively discussed potential harms from the Rule. Rule at 41310-14, 41463-77. Similarly, *American Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914 (D.C. Cir. 2017) concerned the unique requirements of a statute, not at issue here, that agencies must analyze the environmental consequences of proposed federal actions. *Id*. at 920, 930. The agency in that case failed to meet the statutory requirement because it "did not accurately identif[y] the relevant environmental concern" and "refused to even consider the possibility of that broader, real-world impact." *Id*. at 931 (internal quotation marks omitted; alteration in original). Nothing remotely like that occurred here. And in *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630 (D.C. Cir. 2017), unlike here, the agency "totally ignore[d] facts in the record and misconstrue[d] the findings of the ALJ." *Id*. at 638.

Next, Plaintiffs erroneously assert that DHS failed to provide a "detailed justification" for abandoning the 1999 Field Guidance. Am. Resp., at 30. The requirement that agencies "provide a more detailed justification than what would suffice for a new policy created on a blank slate" applies in limited circumstances not present here—such as when the "new policy rests upon factual findings that contradict those which underlay its prior policy" or "when its prior policy has engendered serious reliance interests that must be taken into account"—and even then, that requirement only means that agencies must not "ignore such matters." *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). Plaintiffs argue that the Rule contradicts factual findings in the 1999 Field Guidance. Am. Resp., at 30. But those "findings" are simply statements by the Department of Health and Human Services quoted in the 1999 Notice of Proposed Rulemaking, not the Field Guidance. *Id*. at 30-31 (quoting 64 Fed. Reg. 28676, 28678 (May 26, 1999)). The 1999 rulemaking was never finalized. In any event, nothing in the Rule conflicts with HHS's statement that an individual or family likely could not subsist on non-cash support benefits or services alone. The fact that some benefit use may be characterized as supplemental does not preclude a determination that the individual using those benefits is not self-sufficient. Finally, even if a "more detailed justification" were required, DHS easily met that requirement, for the reasons explained previously. *See* MTD Br., at 33-35.

B. Documents Related to the Rule's Implementation Do Not Support Plaintiffs' Arguments.

Plaintiffs amended their opposition brief to add a new argument concerning Count Three. They now contend that various documents relating to the Rule's implementation—Form I-944 and its instructions, and the USCIS Policy Manual—demonstrate that the Rule is arbitrary and capricious. *See* Am. Resp., at 31-35. But the complaint does not even mention those documents, much less plead any claim based on them, as Plaintiffs concede. *See id*. at 32 n.9 (reserving the

right to amend the complaint to add claims based on these documents). Plaintiffs nevertheless argue that these documents "further buttress" Plaintiffs' claim that the Rule is arbitrary and capricious. *Id*. Plaintiffs are mistaken. As they acknowledge, these documents post-date the Rule itself. *Id*. at 31 (noting that DHS issued these documents "[a]fter promulgating the Final Rule"). These documents, therefore, are hardly relevant to whether the Rule was arbitrary or capricious when promulgated. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (APA review is "based on the full administrative record that was before the [decisionmaker] *at the time he made his decision*") (emphasis added); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) ("[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency's *contemporaneous explanation* in light of the existing administrative record.") (emphasis added).

For instance, Plaintiffs' belief that these documents will "exacerbate confusion and fear," Am. Resp., at 33, is irrelevant to this Court's review of the Rule, which focuses on the agency decision, not subsequent actions or effects. Specifically, review under the APA considers "only whether the [decisionmaker] examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a rational connection between the facts found and the choice made.'" *Dep't of Commerce*, 139 S. Ct. at 2569. Therefore, Plaintiffs' contention that these post-Rule documents will cause harm, even assuming that were true, does not suggest that the decisionmaker acted arbitrarily or capriciously in promulgating the Rule.

Plaintiffs, moreover, misconstrue the documents. They claim that every applicant completing Form I-944 must provide information about receipt of public benefits, "without regard to whether the applicants themselves are exempt from the public charge test." Am. Resp., at 32. But the form's instructions are crystal clear that "[i]f you are exempt from the public charge ground of inadmissibility, you do not need to file Form I-944." *See* Am. Resp., Ex. B at 1. To be sure, the

instructions do require applicants who are subject to the public charge ground of inadmissibility to report certain information about public benefits, even if the applicant falls within a category of individuals for whom receipt of some public benefits will not be considered. *Id*. at 8. But that is because the exclusions from consideration of the receipt of certain public benefits may be limited based on when the benefits were received, for what purpose, or other factors. *See, e.g.*, 8 C.F.R. § 212.21(b)(5) (excluding Medicaid benefits received under specified temporary circumstances, such as pregnancy); *id*. § 212.21(b)(7) (excluding benefits by military members or families depending on whether certain conditions are met). It is necessary for these applicants to list all benefits received so that USCIS can determine which benefits, if any, are to be considered.

Likewise, Plaintiffs' contention that Form I-944 "obscures that certain benefits are, in fact, excluded under the Final Rule," Am. Resp., at 33, is belied by the Form I-944 instructions which clearly list each of the benefits considered under the Rule. Am. Resp., Ex. B at 8. As to Plaintiffs' concerns about the form's references to the October 15, 2019 date, Am. Resp., at 33 n.10, the USCIS website contains special instructions to "[p]lease read all references to Oct. 15, 2019, as though they refer to Feb. 24, 2020." *See* https://www.uscis.gov/i-944 (under the heading Special Instructions).

Next, Form I-944 does not require applicants to monetize all benefits received. Am. Resp., at 34. Question 18, which asks applicants to enter the dollar amount of benefits, explains, "[i]f a question does not apply, please enter N/A." Am. Resp., Ex. A at 9. Also, DHS did not "simply dismiss commenters' objections" that state agencies will have to provide documentation to applicants for Form I-944, as Plaintiffs claim. Am. Resp., at 34. Rather, DHS responded to such comments, acknowledging that various government agencies may incur indirect costs as a result

of the Rule and updating its cost estimates to account for the data submitted by commenters. Rule at 41484.

Lastly, the USCIS Policy Manual does not add "two new negative factors," as Plaintiffs insist. Am. Resp., at 34. DHS explained in the NPRM why it would consider an alien's prospective immigration status and expected period of admission as part of the totality of the circumstances analysis. 83 Fed. Reg. 51114, 51196-97 (contrasting aliens seeking lawful permanent resident status with "aliens who are coming to the United States temporarily as a nonimmigrant"; the latter "may be less likely to avail themselves of public benefits, particularly if they are coming to the United States for a short period of time or if they are coming to the United States for employment purposes"). Also, the Policy Manual does not make a sponsor's receipt of public benefits a "new negative factor," as Plaintiffs claim. Am. Resp., at 35. The Rule explains that DHS will consider, as part of the totality of the circumstances, the "legal sufficiency of the affidavit of support, if required, and the likelihood that a sponsor would actually provide the statutorily-required amount of financial support to the alien[.]" Rule at 41397. Accordingly, facts indicating a weak financial status on the part of the sponsor will cause the agency to accord "less positive weight" to a sponsor's affidavit of support. Am. Resp., Ex. C-2 at 7. In any event, Plaintiffs' belief that the Policy Manual adds new negative factors is a criticism of the Policy Manual, not the Rule. *See Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 387 (D.C. Cir. 2018) (distinguishing between an "agency's unannounced departure in practice from a written regulation" and the "adoption of the regulation itself").

For all these reasons, the Court should dismiss Count Three.

V. Count Four.

To state an equal protection claim, Plaintiffs rely on a bare allegation that the Rule was issued with the intent of affecting a particular sub-group, and a string of generic quotations

regarding immigration—none of which specifically reference the Rule, much less explain why DHS issued the Rule. These allegations are insufficient.

To start, the Court must apply a "deferential standard" when reviewing the government's "broad power" over the "administration of the immigration system," and thus generally do not "probe and test the justifications of immigration policies" if the policies are "facially legitimate and bona fide." *Trump v. Hawaii*, 138 S. Ct. 2392, 2419-20 (2018). Plaintiffs argue that *Hawaii*'s deferential standard does not apply here since the "stated purpose for the rule is not national security." Am. Resp., at 38. Although *Hawaii* noted that the "narrow standard of review has particular force in admission and immigration cases" involving "national security," it made clear that this standard applies "across different contexts and constitutional claims." 138 S. Ct. at 2419. And its analysis was grounded in its recognition that "the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Id*. at 2418. There is no dispute that this case directly implicates the government's policies regarding the admissibility of aliens. The highly deferential standard from *Hawaii* therefore controls here, and ICCIR has failed to plead facts suggesting a plausible claim under that standard.[8]

ICIRR cannot establish an equal protection claim under this standard without "[p]roof of racially discriminatory intent or purpose." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). ICIRR must establish that "the decision maker"—here, DHS—issued the Rule "at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *U.S. v. Moore*, 644 F.3d 553, 558 (7th Cir. 2011). ICIRR, however, does not

[8] ICIRR does not, and cannot, establish that the Rule fails rational basis review under this standard. As noted in *infra* at 26-27, both the Rule and its antecedent notice of proposed rulemaking lay out, in great detail, the legitimate justifications for the Rule's design.

address the Rule's complex procedural history, all of which undermines Plaintiffs' theory that the Rule's design and implementation were motivated by any animus towards a racial sub-group. DHS initially published a 183-page Notice of Proposed Rulemaking concerning the public charge ground of inadmissibility, which identified in great detail the general rationale behind the proposed rule (*e.g.*, to incentivize self-sufficiency), and the rationale for each component of the proposed rule. After receiving and considering public comments on the proposed rule, DHS issued the Rule, which included a number of modifications in response to the public comments. The Rule's preamble is over two hundred pages long, and includes an exhaustive explanation of DHS's rationale for the Rule's final design. This history undermines Plaintiffs' assertion that the Rule's design and implementation were somehow driven by improper motives, rather than the legitimate reasons set forth by DHS in the Rule itself. *See Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 275-79 (1979) (the [stated] purposes of" a rule "provide the surest explanation for its" implementation). Indeed, even some of the quotations identified by Plaintiffs echo the Rule's self-sufficiency rationale. *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").

To show that the Rule was intended, in part, to harm a certain racial sub-group, Plaintiffs again rely on a string of generic quotations concerning immigration. *See* Am. Resp., at 38-39. Most concern immigration in general and are from non-DHS personnel, and thus have no bearing on why DHS issued the Rule.[9] Plaintiffs also flag a quotation from a former USCIS Director. *See id.*

[9] ICIRR suggests that "discriminatory motives" of non-decision-makers may give rise to an equal protection claim, so long as they form "part of the causal chain" resulting in [an agency's] decision." MTD Resp., at 36. ICIRR effectively invokes a "cat's paw" theory, citing to a Maryland

But this too is a generic quotation that does not reference the Rule. And even if the statement was made during a broader discussion that touched on the Rule, it does not express why the former USCIS Director supported the Rule.

Plaintiffs also claim that the historical background of the Rule supports their improper motive allegation. In support, Plaintiffs refer to the Administration's general positions on immigration. But this "historical background" is not specific to the Rule, and sheds little light on its purpose in light of the explanations set forth in both the NPRM and the Rule itself. *See supra* at 26-27. Regardless, Plaintiffs' allegations concerning the Administration's immigration positions show only that the Administration favors enhancing immigration enforcement, not that it seeks to affect only a particular racial subgroup.

CONCLUSION

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

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district court case that in turn relies on the Supreme Court decision *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011). But *Staub* dealt with a statutory discrimination claim, and ICIRR cites to no binding precedent indicating that the "cat's paw" theory applies to equal protection claims. Additionally, the reasoning in *Staub* does not support ICIRR's theory. There, the Supreme Court found that the cat's paw theory applied since "when Congress creates a federal tort, it adopts the background of general tort law," which includes "general principles of . . . agency law." *Staub*, 562 U.S. at 417. Importantly, the Seventh Circuit has already suggested that "agency principles" may not apply to constitutional claims. *See Waters v. City of Chicago*, 580 F.3d 575, 586 n.2 (7th Cir. 2009) ("The [cat's paw] theory is steeped in agency principles which are applied in the Title VII context . . . but don't apply to § 1983 municipal liability."). At the very least, this Court should not blithely extend that doctrine to a Cabinet Secretary acting under an oath to uphold the Constitution and entitled to the presumption of regularity. And in all events, Plaintiffs have failed to state a plausible equal protection claim that any of the quotations at issue were an intended and proximate cause of the Secretary's decision. *See Staub*, 562 U.S. at 419.

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2020, I electronically filed a copy of the foregoing before 3 p.m. central time. 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