UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CASA DE MARYLAND, INC., *et al.* Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	No. 8:19-cv-2715-PWG
CITY OF GAITHERSBURG, MARYLAND, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	No. 8:19-cv-2851-PWG

DEFENDANTS' CONSOLIDATED MOTION TO DISMISS

Pursuant to the Paperless Order entered by the Court on May 6, 2020, Defendants hereby file this consolidated motion to dismiss the above-captioned cases for the reasons stated in the accompanying memorandum of law.

Dated: May 27, 2020

Respectfully submitted,

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DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR CONSOLIDATED 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*, 84 Fed. Reg. 41292 (Aug. 14, 2019) ("Rule"). *See CASA de Md. v. Trump*, 414 F. Supp. 3d 760 (D. Md. 2019). The Court based its decision on a determination that the Rule exceeded DHS's delegated authority under the Immigration and Nationality Act ("INA") and thus violated the Administrative Procedure Act ("APA"). The Court did not pass on the *CASA* Plaintiffs' other arguments: that the Rule was contrary to the Supplemental Nutritional Assistance Program statute; that the Rule was arbitrary and capricious; or that the Rule violated the Due Process and Equal Protection components of the Fifth Amendment. And because the *Gaithersburg* Plaintiffs never moved for a preliminary injunction, the Court never ruled on their largely overlapping claims.

Although several district courts had issued similar preliminary injunctions, all of those have since been stayed. On December 5, 2019, the Ninth Circuit Court of Appeals issued a detailed opinion concluding that the Rule falls well within the Executive Branch's discretion to interpret and implement the public charge inadmissibility provision in the INA. *San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). Defendants apprised the Fourth Circuit of that decision and, on December 9, 2020, the Fourth Circuit stayed this Court's preliminary injunction.

On January 27, 2020, after the Second Circuit refused to stay a lower court's nationwide preliminary injunction, the Supreme Court did so. And on February 21, 2020, the Supreme Court stayed the sole remaining preliminary injunction, which had been entered by the Northern District of Illinois and confined to that State. By those orders, the Supreme Court necessarily found—as had the Ninth and Fourth Circuits—that Defendants were likely to prevail in these cases.

In light of the Supreme Court's repeated stays of injunction, the Ninth Circuit's detailed opinion on the Rule's legality, and for the reasons discussed herein, Defendants respectfully submit that the Court should dismiss these related cases 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 or excludability ground for public charges, and those statutes have, without exception, delegated to the Executive Branch the authority to determine who constitutes a public charge for purposes of that provision. *See* Immigration Act of 1882, 47th Cong. ch. 376, §§ 1-2, 22 Stat. 214 ("1882 Act"); 1891 Immigration Act, 51st Cong. ch. 551, 26 Stat. 1084 ("1891 Act"); Immigration Act of 1907, 59th Cong. ch. 1134, 34 Stat. 898 ("1907 Act"); Immigration Act of 1917, 64th Cong. ch. 29 § 3, 39 Stat. 874, 876 ("1917 Act"); INA of 1952, 82nd Cong. ch. 477, section 212(a)(15), 66 Stat. 163, 183. Indeed, in a Report leading up to the enactment of the INA, the Senate Judiciary Committee emphasized that because "the elements constituting likelihood of becoming a public charge are varied, there should be no attempt to define the term in the law," and that the public charge inadmissibility determinations properly "rest[] within the discretion of" the Executive Branch. S. Rep. No. 81-1515, at 349 (1950).

In 1996, Congress enacted immigration and welfare reform statutes that bear on the public charge inadmissibility determination. The Illegal Immigration Reform and Immigrant

Responsibility Act of 1996 ("IIRIRA"), Division C of Pub. L. No. 104-208, 1110 Stat. 3009-546 (1996) strengthened the enforcement of the public charge inadmissibility ground in several ways. First, Congress instructed that, in making public charge inadmissibility determinations, "the consular officer or the Attorney General shall at a minimum consider the alien's: (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills," 8 U.S.C. § 1182(a)(4)(B), but otherwise left in place the broad delegation of authority to the Executive Branch to determine who constitutes a public charge. IIRIRA also raised the standards and responsibilities for individuals who must "sponsor" an alien by pledging to provide support to maintain that immigrant at the applicable threshold for the period of enforceability and requiring that sponsors demonstrate the means to maintain an annual income at the applicable threshold. Contemporaneously, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105, restricted most aliens from accessing many public support programs, including Supplemental Security Income ("SSI") and nutrition programs. PRWORA also made the sponsorship requirements in IIRIRA legally enforceable against sponsors.

In light of the 1996 legislative developments, the legacy Immigration and Naturalization Service ("INS") started in 1999 to engage in formal rulemaking to guide immigration officers, aliens, and the public in understanding public charge inadmissibility determinations. *See Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28676 (May 26, 1999) ("1999 NPRM"). No final rule was ever issued, however. Instead, the agency adopted the 1999 NPRM interpretation on an interim basis by publishing *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999) ("Field Guidance"). The Field Guidance dramatically narrowed the public charge inadmissibility ground by defining "public charge" as an alien who is likely to become "primarily dependent on the government for subsistence," and by barring immigration officers from considering any non-cash public benefits, regardless of the value or length of receipt, as part of the public charge inadmissibility determination. *See id.* at 28689. Under that standard, an alien receiving Medicaid

(other than for institutionalization for long-term care), food stamps, and public housing, but not cash assistance, would have been treated as no more likely to become a public charge than an alien who was entirely self-sufficient.

The Rule revises that approach and adopts, through notice-and-comment rulemaking, a well-reasoned definition of public charge providing practical guidance to DHS officials making public charge inadmissibility determinations. DHS began by publishing a Notice of Proposed Rulemaking, comprising 182 pages of description, evidence, and analysis. *See Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114 (Oct. 10, 2018) ("NPRM"). The NPRM provided a 60-day public comment period, during which 266,077 comments were received. *See* Rule at 41297. After considering these comments, DHS published the Rule, addressing comments, making several revisions to the proposed rule, and providing over 200 pages of analysis in support of its decision. Among the Rule's major components are provisions defining "public charge" and "public benefit" (which are not defined in the statute), an enumeration of factors to be considered in the totality of the circumstances when making a public charge inadmissibility determination, and a requirement that aliens seeking an extension of stay or a change of status show that they have not received public benefits in excess of the Rule's threshold since obtaining nonimmigrant status. The Rule supersedes the Field Guidance definition of "public charge," establishing a new definition based on a minimum time threshold for the receipt of public benefits. Under this "12/36 standard," a public charge is an alien who receives designated public benefits for more than 12 months in the aggregate within any 36-month period. *Id*. at 41297. Such "public benefits" are extended by the Rule to include many non-cash benefits: with some exceptions, an alien's participation in the Supplemental Nutrition Assistance Program ("SNAP"), Section 8 Housing Programs, Medicaid, and Public Housing may now be considered as part of the public charge inadmissibility determination. *Id*. at 41501-02. The Rule also enumerates a non-exclusive list of factors for assessing whether an alien is likely at any time to become a public charge and explains how DHS

officers should apply these factors as part of a totality-of-the-circumstances determination.[1]

PROCEDURAL HISTORY

The *CASA* and *Gaithersburg* cases were filed on September 16 and 27, 2019, respectively.[2] But while the *CASA* Plaintiffs immediately moved for a preliminary injunction, the *Gaithersburg* Plaintiffs never did. It was not until December 6, 2020, that *Gaithersburg* was deemed related to *CASA* and transferred to this Court accordingly. After several filings and status conferences, these cases were ultimately aligned for consolidated briefing on Defendants' motion to dismiss.

In the meantime, Defendants had appealed from the Court's preliminary injunction and asked the Fourth Circuit for a stay pending appeal. On December 9, 2020, the Court of Appeals stayed the injunction, necessarily accepting Defendants' argument that they would likely prevail on appeal.

Defendants move to dismiss both the *Gaithersburg* First Amended Complaint (No. 8:19-cv-2851, ECF No. 41) (hereinafter the "*Gaithersburg* Compl.") and the *CASA* Second Amended Complaint (No. 8:19-cv-2715, ECF No. 93) (hereinafter the "*CASA* Compl."). In the course of setting a briefing schedule for this consolidated motion, the Court made clear that it expects Defendants not to re-brief arguments that were addressed in the Court's prior opinion on the preliminary injunction. Accordingly, Defendants will incorporate those arguments by reference to their prior opposition memorandum (No. 8:19-cv-2715, ECF No. 52) ("PI Opp'n") below.

STANDARD OF REVIEW

Pursuant to Rule 12(b)(6), a plaintiff's claims are subject to dismissal if they "fail[] to state a claim upon which relief can be granted." *Montgomery Cty., Md. v. Bank of Am. Corp.*, 421 F. Supp. 3d 170, 177 (D. Md. 2019) (quoting Fed. R. Civ. P. 12(b)(6)). A pleading must contain "a

[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] The *Gaithersburg* case was originally captioned the "*Baltimore*" case, as that city was the lead plaintiff. However, when Plaintiffs filed amended complaints on January 3, 2020, the City of Baltimore left that case and joined as a plaintiff in *CASA*.

short and plain statement of the claim showing that the pleader is entitled to relief," *id.*, and must state "a plausible claim for relief," *id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)). "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." *Id.* at 177-78 (quoting *Iqbal*, 556 U.S. at 678). Rule 12(b)(6)'s purpose "is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Id.* (quoting *Presley v. Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006)).

ARGUMENT

I. PLAINTIFFS HAVE NOT ESTABLISHED STANDING OR RIPENESS.

Plaintiffs bear the burden of establishing standing, "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "To seek injunctive relief, a plaintiff must show that [it] is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action . . . ; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The "threatened injury must be certainly impending to constitute injury in fact"; allegations of "possible future injury do not satisfy . . . Art. III." *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990). Neither the government Plaintiffs,[3] the organization Plaintiffs,[4] nor the individual Plaintiffs meet this standard.

First, the government Plaintiffs all allege that they will suffer harm since the Rule will discourage alien enrollment in certain federal benefits, resulting in greater reliance on local

[3] These include the City of Gaithersburg, the Mayor and City Council of Baltimore, and Maryland State Senator Jeffrey Waldstreicher.

[4] These include Friends of Immigrants, Immigrant Law Center of MN, Jewish Council for Public Affairs, Jewish Community Relations Council of Greater Washington, Tzedek DC, and CASA de Maryland.

benefits, thus consuming more of Defendants' resources. *See, e.g.*, *CASA* Compl. ¶¶ 139-140; *Gaithersburg* Compl. ¶¶ 9, 11. But this theory is too speculative to support standing. There is no indication that the government Plaintiffs will "certainly" suffer a net increase in public benefit expenditures. In fact, the government plaintiffs allege that "many resident[s] may forgo use of public benefits altogether," which could ultimately produce a net *savings* for these Plaintiffs. *Gaithersburg* Compl. ¶ 9; *CASA* Compl. ¶ 144 ("[S]ome noncitizens might worry that even receiving care at the City's health clinics will adversely affect them in a public-charge determination—and therefore go without any health care at all."). There is no indication in either Complaint that any alleged cost increase to the government Plaintiffs stemming from the Rule will exceed what they will save because of the Rule. Plaintiffs' theory of harm is also speculative, since it is unclear whether a material number of aliens will necessarily forgo federal benefits and then turn to the government Plaintiffs for further aid.[5]

The organization Plaintiffs likewise do not have standing. These Plaintiffs allude to two different standing theories. They first indicate that they have representational standing on behalf of their members who will be harmed by the Rule. But for representational standing, an organization must make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Id.* Only CASA has identified specific members, and for the reasons set forth in Defendants' prior opposition memorandum, those individuals lack standing. *See* PI Opp'n at 7-8. The other organization Plaintiffs have not identified any specific members who have standing, and thus they do not qualify for representational standing.

The organization Plaintiffs also claim to have standing due to their alleged injuries (organizational standing). An organization may have standing to sue in its own right if the challenged conduct impedes its activities. *See Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012)

[5] At minimum, the government Plaintiffs do not have standing to assert equal protection claims. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16 (1982) ("A State does not have standing as parens patriae to bring an action against the Federal Government."); *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011) (similar).

("An organization may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission."). But "an injury to organizational purpose, without more, does not provide a basis for standing." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 183 (4th Cir. 2013). Nor does a diversion of funds constitute an injury when that diversion results from an organization's "own budgetary choices." *Lane*, 703 F.3d at 674.

Here, none of the organization Plaintiffs alleges that any of its current activities is directly impeded by the Rule. For example, they do not allege that the Rule directly interfered with the provision of their current social, health, or employment programs. These Plaintiffs allege, instead, that they voluntarily diverted resources into other projects due to the Rule, such as "programs to educate and to assist immigrants in navigating the new rules." *Gaithersburg* Compl. ¶ 13; *see also id.* ¶ 17 (ILCM "divert[ed] resources to educate its staff on the" Rule to further its "mission of advocating for" immigrants.); *id.* ¶ 29 (Tzedek DC has "expend[ed] resources to advise" its members of the Rule to further its "mission of safeguarding" immigrant rights."). But this is little more than a budgetary choice. "To determine that an organization that decides to spend its money on educating members" in "response to [a regulation] suffers a cognizable injury would be to imply standing for organizations with merely abstract concern[s] with a subject." *Lane*, 703 F.3d at 675; *see also Buchanan v. Consol. Stores Corp.*, 125 F. Supp. 2d 730, 737 (D. Md. 2001) ("[Plaintiff] chose to investigate Defendant's policy . . . [plaintiff] cannot now claim that because it chose to channel its funds this way, Defendant's [policy] has caused it injury in fact sufficient to satisfy Article III standing requirements.").

In their PI opposition, Defendants made a similar standing argument concerning CASA de Maryland, but the Court rejected it, claiming that "CASA has had to divert resources that otherwise would have been expended to" help its members, since the Rule would affect its broader mission of helping immigrants. *CASA*, 414 F. Supp. 3d at 773. But CASA did not *have* to divert resources to address the Rule, at least any more than the organization plaintiff in *Lane* believed it had to divert resources to address the regulations at issue there. *See* 703 F.3d at 675 (organization plaintiff claimed that it had "been injured because" it diverted resources towards addressing "inquiries into

the operation and consequences of" the regulations at issue). In both cases, the rules at issue did directly interfere with any pre-existing activity of the organizations; each organization simply made a budgetary decision that it would rather contribute resources towards one cause over another—and this type of budgetary decision is insufficient to confer standing. *See id.* ("Although a diversion of resources might harm the organization by reducing the funds available for other purposes," this does not constitute an injury sufficient for Article III standing).

Additionally, for the reasons set forth in Defendants' PI opposition, the individual Plaintiffs similarly lack standing. *See* PI Order, at 7-8. Additionally, Defendants also incorporate by reference their arguments concerning ripeness and the zone of interests. *See* PI Order, 9-13.

II. THE COURT SHOULD DISMISS PLAINTIFFS' CONTRARY-TO-LAW CLAIMS.

The heart of both cases is Plaintiffs' allegation that the Rule's definition of "public charge" conflicts with the INA, 8 U.S.C. § 1182(a)(4). *See CASA* Compl. ¶¶ 149-54 (Count 1); *Gaithersburg* Compl. ¶¶ 94-102 (Count 1). This question is governed by the well-known *Chevron* framework. *See CASA*, 414 F. Supp. 3d at 778. "Under *Chevron* Step One, a court must determine 'whether Congress has directly spoken to the precise question at issue.'" *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If so, the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron*, 467 U.S. at 843). If the court finds that the statute is silent or ambiguous with respect to the specific issue, under *Chevron* Step Two, "a reviewing court must respect the agency's construction of the statute so long as it is permissible." *Id.* (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)).

A. The Rule is Not Contrary to the Immigration and Nationality Act.

The *CASA* Plaintiffs ground their argument in the "historical development of the public-charge provision" (*CASA* Compl. ¶¶ 34-45); "judicial and administrative interpretation of the public-charge inadmissibility ground" (*id.* ¶¶ 46-52); and the 1999 notice of proposed rulemaking and field guidance (*id.* ¶¶ 53-64). The *Gaithersburg* Plaintiffs similarly rely on how "public

charge" has "long been interpreted" (*Gaithersburg* Compl. ¶¶ 32-53).

1. Arguments incorporated by reference.

Most of these sources were addressed in opposition to Plaintiffs' motion for a preliminary injunction and in the Court's opinion granting that motion. Defendants argued that contemporary sources defined "charge" as "an obligation or liability," and distinguished "public charge" and "pauper." PI Opp'n at 13-16 (collecting authorities). Defendants explained why Plaintiffs' reliance on *Boston v. Capen*, 61 Mass. 16 (1951) was unavailing, and pointed to competing contemporary authorities. PI Opp'n at 16. Defendants dispelled Plaintiffs' invocation of the *noscitur a sociis* canon and, particularly, its subsequently-abrogated application in *Gegiow v. Uhl*, 239 U.S. 3 (1915). PI Opp'n at 16-17. Defendants also addressed the alien-support fund established in 1882. *Id.* at 18. Pointing out that the 1999 Field Guidance itself had noted that even short-term receipt of benefits was at least *relevant* to the public charge analysis, Defendants amassed early caselaw supporting that position. *Id.* at 18-19.

Defendants also emphasized that the INA barred aliens who were "likely *at any time* to become a public charge," 8 U.S.C. § 1182(a)(4) (emphasis added), and that Congress had delegated to DHS the authority to define "public charge." PI Opp'n at 20-21. This made Plaintiffs' reenactment-without-change argument fall flat. *Id.* at 21-22. Also unavailing were Plaintiffs' arguments about proposed, but un-enacted, legislation in 1996 and 2013. *Id.* at 22. Finally, Plaintiffs' "incorporation" argument failed because the administrative and judicial precedents on which they relied did not define "public charge" as "requiring permanent and primary dependence." *Id.* at 22-23 (addressing Plaintiffs' cases and administrative decisions).

2. The Ninth Circuit's decision in *San Francisco v. USCIS*.

To date, the Ninth Circuit is the only appellate court to issue a published decision discussing the Rule's legality in depth. That court had little trouble concluding "that DHS's interpretation of 'public charge' is a permissible construction of the INA." *San Francisco*, 944 F.3d at 799.

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

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

3. Additional arguments.

There are additional reasons, not expressly relied on by the Ninth Circuit, why the Rule is consistent with the INA. First, Congress expressly instructed that, when making a public charge inadmissibility determination, DHS "shall not consider any benefits the alien may have received," 8 U.S.C. § 1182(s), including various noncash benefits, if the alien "has been battered or subjected to extreme cruelty in the United States by [specified persons]," *id.* § 1641(c); *see also id.* §§ 1611-1613 (specifying the public benefits for which battered aliens and other qualified aliens are eligible). The prohibition on considering a battered alien's receipt of any benefits presupposes that DHS would, ordinarily, consider the 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 applying for adjustment of status submit an affidavit of support executed by a sponsor to avoid an adverse public charge inadmissibility determination. *See* 8 U.S.C. § 1182(a)(4)(C) (requiring most family-sponsored immigrants to submit enforceable affidavits of support); § 1182(a)(4)(D) (same for

certain employment-based immigrants), § 1183a (affidavit of support requirements). Aliens who fail to submit a required affidavit of support are inadmissible on the public charge ground by operation of law, regardless of their individual circumstances. *Id*. §§ 1182(a)(4), 1183a(a)(1). 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),[6] and it granted federal and state governments the right to seek reimbursement from the sponsor for "any means-tested public benefit" that the government provides to the alien during the period of enforceability, *id*. § 1183a(b)(1)(A); *see also id*. § 1183a(a) (affidavits of support are legally binding and enforceable contracts "against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit").

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

B. The Rule is Not Contrary to the Supplemental Nutritional Assistance Program statute.

Plaintiffs also allege that the Rule is contrary to law insofar as it treats Supplemental Nutritional Assistance Program ("SNAP") benefits as income or resources for public charge inadmissibility purposes. *CASA* Compl. ¶ 153 ("The Public Charge Rule also treats SNAP benefits

[6] The standard applicable to members of the Armed Forces is 100 percent of the Federal poverty line. *Id.* § 1183a(f)(3).

as income or a resource for purposes of public-charge determinations in violation of 7 U.S.C. § 2017(b)."); *Gaithersburg* Compl. ¶¶ 60-61, 99-101 (same).

The pertinent section of the SNAP statute 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 reveals the error in Plaintiffs' argument. The Rule does not consider the "value" of SNAP benefits as "income or resources." 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 Section 2017(b) precludes consideration 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 receipt of SNAP benefits). Therefore, the Rule does not violate the SNAP statute, and Plaintiffs cannot state a claim that it does.

III. THE COURT SHOULD DISMISS PLAINTIFFS' ARBITRARY-AND-CAPRICIOUS CLAIMS.

A. The Rule Does Not Arbitrarily or Capriciously Depart from Prior Practice.

Plaintiffs allege that the Rule is arbitrary and capricious because it departs from the 1999 Field Guidance allegedly without adequate explanation. *See CASA* Compl. ¶¶ 158-59; *Gaithersburg* Compl. ¶¶ 105-09. But the "fact that DHS has changed policy does not substantially alter the burden in the challengers' favor." *San Francisco*, 944 F.3d at 801. It is well-settled that there is "no basis in the Administrative Procedure Act . . . for a requirement . . . [of] more searching review" when an agency changes its position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). And there is certainly no basis to find that the agency's prior interpretation in nonbinding guidance could 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) —particularly since DHS expressly said that its prior position was just one "reasonable" interpretation of an "ambiguous" term, *see* 64 Fed. Reg. 28,676, 28,676-77 (May 26, 1999). Under the Supreme Court's teaching in *Fox*, all that DHS was required to do to permissibly change course from the 1999 Field Guidance was to acknowledge that the Rule is adopting a policy change, provide a reasoned explanation for the change, and explain how it believes the new interpretation is reasonable. *See Fox*, 556 U.S. 514-16. The 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 was ineffective at identifying persons likely to become a public charge, "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.[7]

B. The Rule Adequately Accounts for Relevant Costs and Benefits.

The *CASA* Plaintiffs allege that the Rule is arbitrary and capricious because Defendants did not adequately consider potential harms from the Rule. *See CASA* Compl. ¶ 160(a). Similarly, the *Gaithersburg* Plaintiffs challenge the sufficiency of DHS's "cost benefit analysis." *Gaithersburg* Compl. ¶¶ 116-23. At the outset, to the extent that Plaintiffs are challenging the adequacy of DHS's cost benefit analysis pursuant to Executive Orders 12866 and 13563, *see* NPRM at 51227-74; Rule at 41485-89, their claims are precluded because "Executive Orders cannot give rise to a cause of action" under the APA. *Fla. Bankers Ass'n v. U.S. Dep't of Treas.*, 19 F. Supp. 3d 111, 118 n.1 (D.D.C. 2014), *vacated on other grounds*, 799 F.3d 1065 (D.C. Cir. 2015); *Meyer v. Bush*, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993) ("An Executive Order devoted solely to the internal management of the executive branch—and one which does not create any private rights—is not subject to judicial review.").

In any event, as the Ninth Circuit found, "DHS addressed at length the costs and benefits associated with the Final Rule." *San Francisco*, 944 F.3d at 801; *see also id.* at 803 (discussing DHS's analysis of costs and benefits). DHS explained that, by excluding from the country those

[7] The *Gaithersburg* Plaintiffs also assert that DHS "failed to consider the disruption of significant reliance interests the changed definition will cause, more specifically, the reliance of Plaintiffs in developing government assistance programs and allocating their resources[.]" *Gaithersburg* Compl. ¶ 113. But the Rule did consider those interests. Rule at 41469-70.

aliens likely to rely on public benefits and by encouraging those within the country to become self-sufficient, the Rule is likely to save federal and state governments billions of dollars annually in benefit payments and associated costs. *See* NPRM at 51228. At the same time, DHS recognized that the disenrollment of aliens from public-benefit programs could have certain adverse effects. It noted, for example, that a reduction in public-benefit enrollment and payments could negatively affect third parties who receive such payments as revenue, including, for example, health-care providers that participate in Medicaid and local businesses that accept SNAP benefits. *Id.* at 51118; Rule at 41313. DHS also recognized that disenrollment in public-benefit programs by aliens subject to the Rule or those who incorrectly believe they are subject to the Rule could have adverse consequences on the health and welfare of those populations, while also potentially imposing some "costs [on] states and localities." Rule at 41313.

Although it recognized these potential costs, DHS explained that there were reasons to believe that the costs would not be as great as some feared. *Id.* at 41313. Among other things, in response to commentator concerns, DHS took steps to "mitigate . . . disenrollment impacts," including by exempting certain public benefits from the list of those covered by the Rule. *Id.* at 41313-14. DHS also noted that the majority of aliens subject to the Rule do not currently receive public benefits, either because they reside outside the United States or because, following the 1996 welfare-reform legislation, they are generally precluded from receiving such benefits. *Id.* at 41212-13.

DHS also explained that those classes of aliens who are eligible for the noncash benefits covered by the Rule, such as lawful permanent residents and refugees, are, except in rare circumstances, not subject to a public-charge inadmissibility determination and are thus not affected by the Rule. *Id.* at 41313. DHS also considered and made plans to address disenrollment by those not covered by the Rule. To the extent such individuals disenroll from public benefits out of confusion over the Rule's coverage, the agency reasoned that the effect might be short-lived, as such individuals might re-enroll after realizing their error. *Id.* at 41463. DHS included in the Rule detailed tables listing categories of aliens and indicating whether or not the public charge ground

of inadmissibility applied, as well as tables of nonimmigrants indicating whether the public benefit condition would apply. *See id*. at 41336-46; *see also id*. at 41292 (summarizing populations to whom the rule does not apply). And, to clear up any potential remaining confusion as quickly as possible—thus minimizing disenrollment among populations not subject to the Rule—DHS further stated that it planned to "issue clear guidance that identifies the groups of individuals who are not subject to this rule, including, but not limited to, U.S. citizens, [certain] lawful permanent residents, . . . and refugees." *Id*. at 41313.

Ultimately, DHS rationally concluded that the benefits obtained from promoting self-sufficiency outweighed the Rule's potential costs. *Id*. at 41314. As the agency explained, the precise costs of the Rule were uncertain, given the impossibility of estimating precisely the number of individuals who would disenroll from public-benefit programs as a result of the Rule, how long they would remain disenrolled, and to what extent such disenrollment would ultimately affect state and local communities and governments. *See, e.g.*, *id*. at 41313. At the same time, the Rule provided clear but similarly difficult-to-measure benefits, such as helping to ensure that aliens entering the country or adjusting status are self-reliant and reducing the incentive to immigrate that the availability of public benefits might otherwise provide to aliens abroad. DHS's ultimate decision about whether to move forward with the Rule thus "called for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty." *Dep't of Comm. v. New York*, 139 S. Ct. 2551, 2571 (2019). Given Congress's clear focus on ensuring that aliens admitted to the country rely on private resources and not public benefits, DHS's decision to prioritize self-reliance among aliens is plainly reasonable. *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); *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.").

C. Plaintiffs' Broad Economic Theories About Immigration Do Not Suggest the Rule is Arbitrary or Capricious.

The *Gaithersburg* Plaintiffs allege that the Rule is arbitrary and capricious because it is counter to the evidence regarding the economic impact of the Rule. *Gaithersburg* Compl. ¶¶ 124-41 (Count 4). Specifically, they allege that DHS failed to adequately consider evidence showing that "the United States increasingly relies on immigrants to grow the workforce" and that increased immigration "would likely help to reduce the burden on taxpayers." *Id.* ¶ 129. Plaintiffs insist that "critical demographic trends in the United States will make it less, not more, likely" that the Rule "will result in actual benefits to the public." *Id.* ¶ 130. Plaintiffs argue that DHS failed to adequately respond to comments raising these concerns. *Id.* ¶¶ 137-41.

An agency's obligation to respond to comments on a proposed rulemaking 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. DHS acknowledged that "[a] number of commenters had broad concerns about costs the rule would have on the economy as well as innovation and growth," that "[o]ne commenter stated that the rule would reduce immigration and hurt the country's economic future given the need for immigrant workers to replenish an increasingly aging population," and that another "commenter stated that demographic shifts mean that immigrant communities represented the future of their state, and the rule would significantly harm those communities." Rule at 41472. DHS explained that "[b]eyond the indirect costs and other economic effects described in the economic analysis of this rule, DHS is unable to determine the effect this rule will have on every economic entity mentioned or all aspects of future economic growth." Rule at 41472. DHS agreed that "there may be effects on the U.S. economy and on individuals seeking immigration benefits" and explained that DHS "describes the potential economic effects in the economic analysis of this rule[.]" *Id.*

Plaintiffs' broad economic theories about the impact of immigration generally on the

American economy are well outside the scope of the Rule, which "directly regulates only aliens who, at the time of application for admission, or adjustment of status, are deemed likely at any time in the future to become a public charge or who are seeking extension of stay or change of status." *Id*. In promulgating the Rule, DHS was not deciding whether immigration to the United States should increase or decrease, nor was it revisiting Congress's decision to make aliens likely to become a public charge inadmissible. Rather, DHS was only "prescribing how it will determine whether an alien is inadmissible because he or she is likely at any time to become a public charge and identify the types of public benefits that will be considered in the public charge determination or the public benefit condition." *Id*.

As the Ninth Circuit found, DHS was "defining a simple statutory term—'public charge'—to determine whether an alien is admissible." *San Francisco*, 944 F.3d at 804. "Its only mandate is to regulate immigration and naturalization, not to secure transfer payments to state governments or ensure the stability of the health care industry," much less the entire American economy. *Id*. "DHS has a mandate from Congress with respect to admitting aliens to the United States." *Id*. Accordingly, DHS appropriately determined that Rule's promotion of federal immigration policies, including helping to ensure that aliens entering the country or adjusting status are self-reliant and reducing the incentive to immigrate that the availability of public benefits might otherwise provide to aliens abroad, was a sufficient basis to move forward. Rule at 41312.

D. The Rule Adequately Addresses Comments About Credit Scores.

The *Gaithersburg* Plaintiffs allege that DHS failed to adequately address comments "that credit reports are not a reliable basis for determining an immigrant's present or future self-reliance." *Gaithersburg* Compl. ¶¶ 142-47 (Count 5). But DHS extensively addressed such comments and easily met its obligation to respond. Rule at 41425-28. DHS reasonably concluded that an individual's credit history and credit score are relevant evidence of his or her financial status. *Id*.; *see also* 8 U.S.C. § 1182(a)(4)(B)(i) (requiring DHS to consider financial status). As the Rule explains, "[c]redit reports and credit scores provide information about a person's bill

paying history, loans, age of current accounts, current debts, as well as work, residences, lawsuits, arrests, collections, actions, outstanding debts and bankruptcies in the United States." Rule at 41425-26. "DHS's use of the credit report or scores focuses on the assessment of these debts, liabilities, and related indicators, as one indicator of an alien's strong or weak financial status[.]" *Id*. at 41426.

Contrary to Plaintiffs' suggestion, *Gaithersburg* Compl. ¶ 145, DHS also reasonably accounted for the possibility that some aliens will have a thin or nonexistent credit history. The Rule explains that "DHS understands that not everyone has a credit history in the United States and would not consider the lack of a credit report or score as a negative factor." Rule at 41426. Nor is it the case that consideration of a credit report or credit score is improper because, as Plaintiffs contend, credit reports might contain errors. *Gaithersburg* Compl. ¶ 146. Neither of these possibilities changes the fact that, notwithstanding occasional flaws, credit reports are probative of an individual's financial condition, as evidenced by their widespread use throughout the American economy. Rule at 41426 ("A credit report generally is considered [a] reasonably reliable third-party record . . . for purposes of verifying" financial information).

E. Plaintiffs' Additional Theories Fail to Suggest the Rule is Arbitrary or Capricious.

The *CASA* Plaintiffs also allege that the "proposed threshold for deeming a noncitizen 'likely at any time to become a public charge' is so de minimis and difficult to apply that it is irrational." *CASA* Compl. ¶ 161. Likewise, the *Gaithersburg* Plaintiffs allege that the Rule's lack of a dollar-value threshold for public benefit use is arbitrary and capricious. *Gaithersburg* Compl. ¶¶ 110-12, 139-40.[8] But the Rule's definition of "public charge" alleviates concerns about de

[8] The *Gaithersburg* Plaintiffs seem also to suggest that that the "15 percent of the Federal Poverty Guidelines" threshold in the Proposed Rule was itself arbitrary and capricious. *Gaithersburg* Compl. ¶¶ 110-11. But because that threshold was abandoned in the Rule, it cannot serve as the basis for an arbitrary-and-capricious claim now. Also, there is no merit to Plaintiffs' claim that they did not have an opportunity to comment on the Rule's definition of "public charge." *Gaithersburg Compl.* ¶¶ 148-57 (Count 6). "An agency, of course, may promulgate final rules that differ from the proposed regulations." *Shell Oil Co. v. EPA*, 950 F.2d 741, 750 (D.C. Cir. 1991). "To avoid 'the absurdity that . . . the agency can learn from the comments on its proposals only at

minimis use of public benefits by imposing a durational requirement: only if the alien is likely to receive benefits for more than 12 months in a 36-month period will the public charge test be met. Rule at 41295. It was entirely rational for DHS to conclude that an individual who relies on public assistance for a lengthy amount of time to meet his or her basic needs should be defined as a public charge. Rule at 41359. Moreover, a judgment about the amount of public benefits that render someone a public charge is exactly the type of question that Congress delegated to DHS.

The *CASA* Plaintiffs also contend that DHS "fail[ed] to rely on the expert agencies charged with administering public benefits," *CASA* Compl. ¶ 161, but in their motion for a preliminary injunction those Plaintiffs acknowledged DHS's statement that it had, in fact, "consulted with the relevant Federal agencies regarding the inclusion and consideration of certain . . . public benefits," *CASA* Mot. for Prelim. Inj. (ECF No. 6) ("*CASA* Mot.") at 20. In any event, there is no requirement in the APA that agencies consult with other agencies in the course of a rulemaking, or that they disclose the substance of any consultations that may occur. Rule at 41460 ("Interagency discussions are a part of the internal deliberative process associated with the rulemaking.").

Lastly, the *CASA* Plaintiffs allege that "DHS failed to meaningfully consider the test it has imposed is so vague as to invite arbitrary and discriminatory enforcement." *CASA* Compl. ¶ 160(c). But DHS explained that the NPRM had "provided specific examples of various concepts and laid out in great detail the applicability of the rule to different classes of aliens," and "also provided an exhaustive list of the additional non-cash public benefits that would be considered[.]" Rule at 41321. DHS also discussed the various changes it made to address the vagueness concerns, including revising the list of public benefits, simplifying the benefits threshold, and deciding not to consider receipt of benefits not listed in the Rule. *Id*. Further, DHS stated that it intends to provide "clear guidance to ensure that there is adequate knowledge and understanding among the

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the peril of starting a new procedural round of commentary," the D.C. Circuit has "held that final rules need only be a 'logical outgrowth' of the proposed regulations." *Id*. at 750-51. Given that the NPRM extensively discussed DHS's proposed definition, *see* NPRM at 51158-73, the public clearly had an opportunity to submit comments on that proposal, including comments about whether DHS should adopt an alternative definition.

regulated public regarding which benefits will be considered and when, as well as to ensure that aliens understand whether they are or are not subject to the public charge ground of inadmissibility." *Id*. Also, contrary to the *CASA* Plaintiffs allegation, *CASA* Compl. ¶ 160(b), DHS extensively addressed comments that the Rule violates equal protection by describing the legitimate purposes of the Rule and explaining how it complies with applicable legal precedents. Rule at 41308-10.

IV. THE COURT SHOULD DISMISS PLAINTIFFS' CONSTITUTIONAL CLAIMS.

A. The Rule Does Not Violate Due Process.

The *CASA* Plaintiffs allege that the Rule violates the Due Process component of the Fifth Amendment. *CASA* Compl. ¶¶ 163-67 (Count 3). The "void for vagueness" doctrine on which Plaintiffs rely is a "principle of due process", which requires that "[n]o person . . . be deprived of life, liberty, or property, without due process of law." *Grayned v. City of Rockford*, 408 U.S. 104 (1972); U.S. Const. amend. V.

As a threshold matter, "a due process claim requires the deprivation of some cognizable interest or property," and it is well-established in this Circuit that "[a]liens do not have a property interest or right to an adjustment of status." *Igwebuike v. Caterisano*, 230 Fed. App'x 278, 285 (4th Cir. 2007); *see also Dekoladenu v. Gonzales*, 459 F.3d 500, 508 (4th Cir. 2006), *overruled on other grounds*, *Dada v. Mukasey*, 554 U.S. 1 (2008). This is because "requests for adjustment of status are purely discretionary forms of relief," and "no property or liberty interest can exist when the relief sought is discretionary." *Dekoladenu*, 459 F.3d at 508. Therefore, Plaintiffs cannot begin to "make out a due process violation" and their vagueness challenge must be rejected. *Id.*[9]

Plaintiffs previously urged the Court to overturn this long-established doctrine, proposing to subject "the entire [statutory] scheme" including *all* of "the INA's admissibility and

[9] Nor is there any cognizable Fifth Amendment interest in an initial decision regarding inadmissibility, because "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

deportability provisions," and potentially other facets of the INA, "to void-for-vagueness review" under "the most exacting vagueness standard." *CASA* Mot. at 27, 30. The cases relied on by Plaintiffs for this radical argument require no such result. Plaintiffs cite the Fifth Amendment due process right in deportation proceedings recognized in *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903), but more than 100 years after that decision, the right recognized there has never been extended to discretionary immigration decisions, even discretionary relief from deportation itself. *See, e.g.*, *Smith v. Ashcroft*, 295 F.3d 425, 431 (4th Cir. 2002). And although *Rusu v. INS*, 296 F.3d 316, 321-22 (4th Cir. 2002), recognized an unspecified liberty interest in asylum hearings, subsequent Fourth Circuit holdings reiterated that no such interest attaches to adjustment of status. *See Igwebuike*, 230 Fed. App'x at 285; *Dekoladenu*, 459 F.3d at 508. The Supreme Court decision in *Dimaya v. Sessions* similarly works no such major change, as it is simply another case addressing whether a "*lawful permanent resident* alien" may be "subject to removal." 138 S. Ct. 1204, 1224 (Gorsuch, J., concurring) (2018) (emphasis added).[10]

Even if Plaintiffs could assert a Fifth Amendment due process claim, there is no vagueness problem with the Rule. At its core, the Rule works to resolve the very concerns that motivate the vagueness doctrine in the first place by supplying additional "guidelines [and] standards regarding who qualifies as" a public charge that exist only in broad strokes in the public charge statute. *Manning v. Caldwell*, 930 F.3d 264, 274 (4th Cir. 2019). As the Rule explains, the hundreds of pages of material in the NPRM "provided specific examples of various concepts and laid out in great detail the applicability of the rule to different classes of aliens," and the final Rule was revised to provide a "single, objective duration-based threshold applicable to the receipt of all included public benefits." Rule at 41321. This provides far more "fair notice to [aliens] about what conduct

[10] Justice Gorsuch's concurring opinion, which is controlling under the standard for finding the holding of a divided Court in *Marks v. United States*, 430 U.S. 188 (1977), *see United States v. Halstead*, 634 F.3d 270, 277 (4th Cir. 2011), makes clear that his application of the void-for-vagueness doctrine is dependent on the fact that deportation involves "the deprivation of a statutorily afforded liberty interest," *Dimaya*, 138 S. Ct. at 1230, which is lacking here. *See Igwebuike*, *supra*.

is targeted by [the] statutory [public charge]" inadmissibility ground, *Manning*, 930 F.3d at 273, than the abbreviated and non-exhaustive list of enumerated factors in the statute, *see* 8 U.S.C. § 1182(a)(4), or the sweeping and non-specific "primarily dependent" language set forth in the 1999 Interim Field Guidance. For this reason, as DHS explained, Plaintiffs' vagueness objection is "a byproduct" of the statutory language and the longstanding "totality of the circumstances" test, neither of which Plaintiffs challenge here. *See* Rule at 41321. Finally, it is well established—even in the criminal context—that where a significant public policy interest requires a "predict[ion] of future behavior," there is no vagueness problem with a statute that grants a factfinder "wide discretion to make a predictive judgment," such as through the totality of the circumstances determination at issue here. *Nguyen v. Reynolds*, 131 F.3d 1340, 1353-54 (10th Cir. 1997); *accord Jurek v. Texas*, 428 U.S. 262 (1976).

B. The Rule Does Not Violate Equal Protection.

Plaintiffs allege the Rule violates the Equal Protection component of the Fifth Amendment to the Constitution. *CASA* Compl. ¶¶ 168-72 (Count 4); *Gaithersburg* Compl. ¶¶ 158-68 (Count 7). Plaintiffs fail to state an equal protection claim because their complaint includes no well-pled allegation that DHS issued the Rule based on any improper discriminatory motive. Plaintiffs do not deny that the Rule is facially neutral, but claim that the Rule violates the equal protection clause because its alleged purpose is to disproportionately affect a particular racial subset of immigrants. *See Gaithersburg* Compl. ¶ 163; *CASA* Compl. ¶ 171. In support, Plaintiffs rely primarily on a handful of stray comments by certain non-DHS government officials concerning immigration in general, rather than the Rule in particular. Plaintiffs' allegations are insufficient to establish a plausible equal protection claim.

"[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 265. "Discriminatory purpose . . . implies more than intent

as volition or intent as awareness of consequences." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). "It implies that the *decisionmaker* . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* (emphasis added). Additionally, strict scrutiny does not apply simply because a plaintiff alleges a disproportionate impact on a particular racial or ethnic group; rational basis applies unless Plaintiffs establish discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Disproportionate impact . . . [s]tanding alone . . . . does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny").

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

Under any potentially-applicable standard, however, this claim fails because Plaintiffs' allegations do not suggest that DHS issued the Rule "because of" any alleged "adverse effects upon an identifiable" racial or ethnic group. First, "the [stated] purposes of the" Rule "provide the surest explanation for its" design and implementation. *Feeney*, 442 U.S. at 279. The Rule's

preamble (spanning roughly 200 pages) thoroughly explains the Rule's non-discriminatory justifications, including the need to facilitate self-sufficiency among immigrants. *See* Rule at 41295 ("DHS is revising its interpretation of 'public charge' . . . to better ensure that aliens subject to the public charge inadmissibility ground are self-sufficient."); Rule at 41308 ("DHS believes [the] broader definition [of public charge] is consistent with Congress' intention that aliens should be self-sufficient. Self-sufficiency is, and has long been, a basic principle of immigration law in this country. DHS believes that this rule aligns DHS regulations with that principle."). Additionally, the Rule's construction was guided by an extensive notice-and-comment process, following a NPRM that was just under 200 pages long. *See* NPRM. The Rule included a number of changes from the proposed rule in response to public comments. *See, e.g.*, Rule at 41297. The Rule's procedural history undermines Plaintiffs' conclusory assertion that the Rule's design may somehow be attributed to any alleged improper bias.

Second, to show that DHS issued the Rule due to improper motives, Plaintiffs rely almost exclusively on alleged public statements by non-DHS officials. The alleged public statements in the Complaint do not reference the Rule, and do not otherwise reveal why any particular official supported the Rule. *See, e.g.*, *Gaithersburg* Compl. ¶ 80 (expressing support for a "merit-based entry system"); *CASA* Compl. ¶ 115 (general comments on U.S. refugee policy). Additionally, certain comments are consistent with the Rule's stated rationale. *See, e.g.*, *Gaithersburg* Compl. ¶ 79 (expressing view that immigrants consume "public resources"). Regardless, "contemporary statements" may be relevant to the question of whether an "invidious discriminatory purpose was a motivating factor," if made "by members of the decisionmaking body." *Arlington Heights*, 429 U.S. at 268; *see also Clearwater v. Indep. Sch. Dist. No. 166*, 231 F.3d 1122, 1126 (8th Cir. 2000) ("Evidence demonstrating discriminatory animus in the decisional process needs to be distinguished from stray remarks . . . statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process."). Here, Plaintiffs rely largely on statements made by non-DHS personnel, and Plaintiffs provide no explanation for how these statements reveal that *DHS* harbored an improper motive in implementing the Rule. Accordingly, Plaintiffs'

equal protection claims should be dismissed.

CONCLUSION

For the foregoing reasons, these related cases should be dismissed.

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