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' REPLY MEMORANDUM IN SUPPORT OF
THEIR CONSOLIDATED MOTION TO DISMISS

Pursuant to the Paperless Order entered by the Court on May 6, 2020, Defendants hereby file this reply memorandum in support of their Motion to Dismiss (ECF No. 116) and Memorandum of Law in support thereof (ECF No. 116-1) ("Mem."), and in response to Plaintiffs' Consolidated Opposition Memorandum (ECF No. 117) ("Opp'n").

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I. PLAINTIFFS HAVE NOT ESTABLISHED THAT THEIR CLAIMS ARE JUSTICIABLE.

No Plaintiff has alleged an imminent, non-speculative injury sufficient for standing. *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("threatened injury must be certainly impending to constitute injury in fact"; allegations of "possible future injury do not satisfy . . . Art. III."). First, the government Plaintiffs rely on alleged budgetary harms, yet none has adequately alleged that it will necessarily suffer any *net* budgetary harm. These Plaintiffs acknowledge that the Rule may produce certain cost savings for local governments since it may discourage aliens from relying on local benefits. *See*, *e.g.*, *Gaithersburg* Compl. ¶ 9 ("many resident[s] may forgo use of public benefits altogether"); *CASA* Compl. ¶ 144. The Rule may also produce cost savings by rendering inadmissible those aliens who otherwise would have resided in the government Plaintiffs' jurisdictions, and utilized local benefits. Thus, even if certain aliens will disenroll from federal programs, and rely more on local benefits, these Plaintiffs will suffer harm *only* if these costs exceed what the Plaintiffs will save due to the Rule. But there is no well-pled, non-speculative allegation that any Plaintiff will necessarily suffer any net monetary harm. In response, Plaintiffs assert, with little support, that this argument "strains logic." Opp'n at 5. But it does not "strain logic" to point out Plaintiffs have suffered no economic harm if they are left no worse off (and possibly better off) as a result of the Rule.

Second, the organization Plaintiffs lack standing. To establish organizational standing, these Plaintiffs must show that the Rule "perceptibly impaired" their concrete "activities." *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). They do not have standing simply because the Rule conflicts with their abstract mission, or because they *chose* to devote resources towards addressing the Rule. *See Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) (even if "a diversion of resources might harm the organization by reducing the funds available for other purposes, it results not from any actions taken by [the defendant], but rather from the [organization's] own budgetary choices"). The organization Plaintiffs do not claim that the Rule directly interferes with any of their pre-existing, concrete *activities*. They allege only that they

chose to dedicate resources towards the Rule, and thus drew upon resources initially allocated elsewhere. But this reflects a "budgetary choice" to spend resources on one cause over another, which is insufficient for standing. *See id.* Plaintiffs claim that *Lane* is inapplicable because that case involved only "bare-bones allegations." *See* Opp'n at 7. But the Fourth Circuit found that the organization plaintiff in *Lane* lacked standing, not because it relied on "bare-bones allegations," but because—like the organization Plaintiffs here—its only alleged injury stemmed from its own budgetary choices. *See id.*

The organization Plaintiffs also claim to have representational standing. *See* Opp'n at 7. However, they cannot claim representational standing based on named Plaintiffs Angel Aguiluz and Monica Camacho Perez, since neither of these Plaintiffs has alleged that he or she will imminently undergo a public-charge inquiry, and be found inadmissible as a public charge. *See* PI Opp'n at 7-8. Plaintiffs also claim that they may have standing based on certain other, unnamed members. But like Plaintiffs Aguiluz and Perez, those unnamed organization members have not alleged that they face any imminent harm as a result of the Rule.

Even if the government or organization 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). A plaintiff falls outside this zone when its "interests are . . . marginally related to or inconsistent with the purposes implicit in the statute." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987). Here, the alleged injuries of the government and organization Plaintiffs are too far attenuated from the zone of interests for the INA's public-charge inadmissibility provision, which encompasses injuries to those rendered inadmissible as public charges. In response, Plaintiffs claim that States come within the relevant zone of interests because the public-charge inadmissibility provision seeks to protect State coffers. Opp'n at 9. But the provision aims to achieve that goal by excluding, as inadmissible, those likely to rely on public benefits. Plaintiffs here seek to protect State coffers by *increasing* reliance on federal benefits—an interest directly opposed to the purpose of the public

charge inadmissibility provision.

Plaintiffs claim that the organizations come within the relevant zone of interests because they assist those who seek to adjust their immigration status, and thus may be subject to a public-charge inquiry. *See* Opp'n at 9-10. But this shows only that the organization Plaintiffs help those who may have alleged injuries that *do* fall within the relevant zone of interests. There is still no indication that the INA's public charge inadmissibility provision seeks to benefit the organizations, or protect *their* interest in providing social or economic services. *Cf. INS v. Legalization Assistance Project of the Los Angeles Cty. Ed'n of Labor*, 510 U.S. 1301, 1304-05 (1993) (O'Connor, J., in chambers) (concluding that relevant INA provisions were "clearly meant to protect the interests of undocumented aliens, not the interests of organizations [that provide legal help to immigrants]," and that the fact that a "regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect").

Finally, neither the State nor organization Plaintiffs are proper plaintiffs for the equal protection claim. They do not allege that *they* were subject to any unlawful discrimination. Nor have these Plaintiffs established that they have a right to enforce, as third parties, the rights of those who were allegedly subject to unlawful discrimination. "To overcome the prudential limitation on third-party standing, a plaintiff must demonstrate: (1) an injury-in-fact; (2) a close relationship between herself and the person whose right she seeks to assert; and (3) a hindrance to the third party's ability to protect his or her own interests." *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 215 (4th Cir. 2002). Here, Plaintiffs cannot show that there is a hindrance to the third parties' ability to protect their own rights given that this litigation includes two named Plaintiffs seeking to enforce their own rights. Accordingly, all parties lack Article III standing, and the government and organization Plaintiffs are also not the proper Plaintiffs to assert these claims.

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

As a preliminary matter, Plaintiffs insist that they should win at *Chevron* step one. That argument has been expressly rejected by both courts of appeal to address the subject in written opinions. *See San Francisco*, 944 F.3d at 796-97 ("'public charge' does not have a fixed, unambiguous meaning"); *Cook Cnty., Ill. v. Wolf*, -- F.3d --, No. 19-3169, 2020 WL 3072046, at *11 (7th Cir. June 10, 2020) ("[T]his case cannot be resolved at *Chevron* step one.").

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

The Seventh Circuit, while agreeing that the case could not be resolved at *Chevron* step one, divided over the question whether the Rule reasonably interprets "public charge." But the majority's conclusion proceeds from the premise that "it does violence to the English language and the statutory context to say that it covers a person who receives only *de minimis* benefits for a *de minimis* period of time." *Cook County*, 2020 WL 3072046, at *13. While that conclusion was ostensibly "backed up by the weight of history," *id.*, the majority previously admitted that "public charge" had "evolved over time," and did not unambiguously mean "long-term, primary dependence," *id.* at *11. And indeed, that history—inspected in greater detail by the dissent—confirms that "public charge" is "a much more capacious term, not only as a matter of history, but also by virtue of the 1996 amendments to the public charge provision." *Id.* at *21-28 (Barrett, J., dissenting).

Plaintiffs nevertheless stand by their interpretation of that history. They argue, for example, that *Matter of B-* "in no way suggests that the noncitizen could have been deported on public-charge grounds for failure to pay for those incidental expenses." Opp'n at 12 (citing *San Francisco*, 944 F.3d at 795; *Matter of B-*, 3 I. & N. Dec. 323 (BIA & AG 1948)). The question in that case was whether the alien, committed to a mental hospital less than six months after entry, had become a public charge. Reasoning that, because Illinois law did not allow the state to charge the alien for treatment rendered at the hospital, the Board held, and the Attorney General affirmed, that she could not have become a public charge based on the cost of those services. 3 I. & N. Dec. at 326-27. But because Illinois law made the patient responsible for "clothing, transportation, and other

incidental expenses," she *could* have been deemed a public charge if she (or her family) failed to reimburse *those* expenses. Thus, contrary to Plaintiffs' argument, *Matter of B-* contemplates a scenario in which failure to repay "incidental expenses" incurred by a state hospital could render one a public charge.[1]

Plaintiffs then turn to the two, related INA provisions cited by Defendants in their motion. *See* Mem. at 11-12 (citing the battered-alien exception, 8 U.S.C. § 1182(s), and the affidavit-of-support provisions, *id.* §§ 1182(a)(4)(C)-(D), 1183a). On the battered-alien provision, Plaintiffs respond only that "DHS's Rule is contrary to law not because it considers noncitizens' *past* receipt of benefits . . . but because it denies admission and LPR status to noncitizens based on a prediction about whether they will, *in the future*, accept a small amount of public benefits." Opp'n at 12-13. Past versus future consumption of benefits is beside the point; Plaintiffs have argued that a public-charge analysis cannot, by definition, consider receipt of certain benefits. The battered-alien exception makes plain that it can.

Plaintiffs argue that the affidavit-of-support provision is irrelevant for five reasons. First, "DHS itself noted that an unfavorable public-charge determination involves 'more than a showing of a possibility that the alien will require public support.'" Opp'n at 13 (citing 2018 NPRM, 83 Fed. Reg. 51,114, 51,125 (Oct. 10, 2018) (quoting *Martinez-Lopez*, 10 I. & N. Dec. at 421)). Defendants agree: an alien must be "likely" at any time to become a public charge. 8 U.S.C. § 1182(a)(4)(A). The salient point, with regard to the affidavit provision, is the Congress required certain aliens to obtain affidavits promising to repay *any* means-tested benefits the alien receives—even if brief and minimal—lest the alien be excludable as a "public charge." Thus, the Rule's "12/36" definition cannot be contrary to Congress's definition of "public charge."

Second and third, Plaintiffs argue that the affidavit provision only applies to a "limited

[1] The two issues of INS's "Monthly Review," introduced for the first time in a footnote to Plaintiffs' opposition memorandum, Opp'n at 12 n.10 & Exs. A, B, are hardly helpful for Plaintiffs. These informal publications, issued before the INA was even passed, cannot resolve any ambiguity in the meaning of "public charge"—much less "decisively" so. *Id.* at 12 n.10.

subset of noncitizens" and that affidavits are "enforceable for only a limited period of time," respectively. Opp'n at 13. But the point is that if *any* noncitizen can be excluded based on *any* unreimbursed benefits, then Plaintiffs' narrow reading of "public charge" cannot be correct—nor can the Rule's interpretation fall outside the bounds of the statute. *See Cook County*, 2020 WL 3072046, at *26-27 (Barrett, J., dissenting) (rejecting similar arguments).

Fourth, Plaintiffs suggest that the 1996 legislation was not intended to make it harder to adjust status, but rather to make affidavits legally enforceable. Opp'n at 13. But the legislative history they cite proves the opposite: "a prospective permanent resident alien . . . *who would otherwise be excluded as a public charge* . . . [is able] to overcome the exclusion through an affidavit of support." H.R. Rep. No. 104-725, at 387–88 (1996) (Conf. Rep.) (emphasis added).

Fifth, Plaintiffs cite failed legislation from 1996, relied on in the Court's preliminary-injunction opinion. Opp'n at 13. "Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute," because "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160, 170 (2001). That point was made by the Ninth Circuit in rejecting the same argument. *See San Francisco*, 944 F.3d at 797-98.[2]

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

The point of the relevant SNAP provision, allegedly violated by the Rule, is to preclude the government from considering the *value* of SNAP benefits as "income" or "resources" for the purpose of "taxation, welfare, [or] public assistance programs." *See* Mem. at 12-13 (citing 7 U.S.C. § 2017(b)). Put simply, SNAP recipients should not be taxed on the value of their SNAP benefits, nor should those benefits count toward means testing, such that receipt of SNAP could disqualify someone for other assistance. The Rule does neither. Nor does it "require[] immigration officials

[2] *See also Bostock v. Clayton Cnty.*, No. 17-1618, 2020 WL 3146686, at *12 (U.S. June 15, 2020) ("[S]peculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt.").

to unlawfully take into account the possibility that noncitizens might one day receive SNAP benefits at a 'value' other than zero." Opp'n at 14. "The Rule merely notes that receipt of the benefits is an indicium of a lack of self-sufficiency. Whatever else one might say about that position, it is not one that the SNAP law forbids." *Cook County*, 2020 WL 3072046, at *11. Just as the Seventh Circuit did, the Court should reject this claim.

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

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

Plaintiffs question whether DHS provided a reasoned explanation for departing from the non-binding 1999 Field Guidance. Opp'n at 14. DHS adequately explained that the narrow definition of "public charge" adopted by the Field Guidance excluded many individuals who would reasonably qualify as public charges. NPRM at 51164. The 1999 Field Guidance generally defined "public charge" as a person who is primarily dependent on public benefits, but DHS determined that individuals below that threshold may lack self-sufficiency. *Id.* at 51163-64. Plaintiffs argue that DHS's explanation is not "reasonable because the term 'self-sufficient' appears nowhere in the public-charge provision." Opp'n at 15. But there is no question that the concept of self-sufficiency is directly relevant to whether someone is a public charge, under any conceivable definition of "public charge." *See San Francisco*, 944 F.3d at 799 ("Receipt of non-cash public assistance is surely relevant to 'self-sufficiency' and whether immigrants are 'depend[ing] on public resources to meet their needs.'"). The only question is to what extent a person must lack self-sufficiency to be considered a public charge. It was thus rational for DHS to conclude that aliens who rely on the public benefits enumerated in the Rule for months at a time are aliens who "depend on public resources to meet their needs," 8 U.S.C. § 1601(2)(A), and are not "self-sufficien[t]," *id.* § 1601(1). Even the 1999 Field Guidance tied the definition of public charge to the receipt of public benefits. Field Guidance at 28689. The Rule simply redefines what benefits received over what time period qualify an alien as a public charge.

Plaintiffs also insist that the Rule's definition of "public charge" is irrational because, in

their view, it would include aliens who use benefits in amounts that Plaintiffs deem "de minimis." Opp'n at 16. But DHS determined that it could best achieve Congress's statutory purposes by setting a threshold of more than twelve months of enumerated benefits within a 36-month period. That standard is not met with "de minimis" reliance on benefits, as Plaintiffs suggest. It was entirely rational for DHS to conclude that an individual who relies on public assistance for a significant amount of time to meet his or her basic needs should be defined as a public charge, particularly where Congress's statutory requirement that the inadmissibility ground apply to a person determined likely "at any time" to become a public charge indicates concern even with short periods of reliance on public assistance. *See* 8 U.S.C. § 1182(a)(4)(A); Rule at 41421-22. In any event, judgments about the amount of public benefits that render an alien a public charge are precisely the kind of issue Congress delegated to DHS. *See Thor Power Tool Co. v. Comm'r of Internal Review*, 439 U.S. 522, 540 (1979). The fact that Plaintiffs might have selected a different threshold does not make DHS's decision irrational.

Plaintiffs similarly argue that the Rule is irrational because noncash public benefits "*enhance* recipients' well-being, not ensure their subsistence." Opp'n at 16 (emphasis in original). Yet it was Congress that expressly equated a lack of self-sufficiency with receipt of "public benefits," which it defined broadly to include the noncash benefits at issue here. 8 U.S.C. §§ 1601(2)-(4), 1611(c). For aliens, Congress's intent is that aliens should be self-sufficient before they seek admission or adjustment of status, not that they should someday attain self-sufficiency by drawing on public resources to improve their financial condition. Rule at 41308, 41421; *see* 8 U.S.C. § 1601. Nor was there anything irrational with DHS's consideration of aggregate public expenditures on certain non-cash benefits when formulating the Rule. Opp'n at 16-17. The clear purpose of the public charge statute is to protect federal and state governments from having to expend taxpayer resources to support aliens admitted to the country or allowed to adjust to lawful-permanent-resident status. *See Cook County*, 2020 WL 3072046, at **18-32 (Barrett, J., dissenting).

Lastly, Plaintiffs argue that the Rule contradicts factual findings in the 1999 Notice of

Proposed Rulemaking (which never resulted in a final rule). Opp'n at 17. But those "findings" are simply statements by the Department of Health and Human Services. *See* 64 Fed. Reg. 28676, 28678 (May 26, 1999). 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. Thus, there is no inconsistency.

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

Plaintiffs misstate Defendants' position by claiming that "Defendants disavow any obligation to consider the Public Charge Rule's adverse effects[.]" Opp'n at 18. What Defendants argued, and what Plaintiffs fail to meaningfully respond to, is that the adequacy of DHS's cost-benefit analysis pursuant to certain executive orders is not subject to challenge. Mot. at 15. In any event, Defendants have already explained how they adequately addressed the potential costs from the Rule, Mot. at 15-17, which the Ninth Circuit found DHS "addressed at length" in full compliance with the APA. *See San Francisco*, 944 F.3d at 800-05.

As to harms relating to disenrollment from public benefits, Plaintiffs accuse DHS of "throwing up its hands" because DHS observed, accurately, that it is impossible to "estimat[e] 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." Mot. at 17. Plaintiffs point to a study estimating the number of people who might disenroll from benefits because of the Rule, and they erroneously claim that DHS did not provide an alternative estimate. Opp'n at 19. In fact, DHS did estimate that number in its Regulatory Impact Analysis. Rule at 41312; *see also id.* at 41463 (discussing 2.5% estimated disenrollment rate).[3] Accordingly, DHS did consider the costs

[3] Contrary to Plaintiffs' assertion, the study they reference does not estimate that 24 million people would disenroll from public benefits because of the Rule. Opp'n at 19. The study determined that 24 million people live "in a family with at least one non-citizen immigrant, and where someone in that family has received one of the public benefits named in the public charge rule." *Only Wealthy Immigrants Need Apply*, at 1 (2018), *available at* https://perma.cc/PK5W-RJP3. The study

associated with the Rule and explained why the Rule was nevertheless justified. The APA required nothing more. *San Francisco*, 944 F.3d at 803; *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"); *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.").[4]

Plaintiffs next accuse DHS of failing to "grapple with" "the public-health and food-insecurity consequences that will flow from the Rule's chilling effect." Opp'n at 19-20. But "DHS not only addressed these concerns directly, it changed its Final Rule in response to the comments." *San Francisco*, 944 F.3d at 804. For example, DHS exempted certain public benefits from the list of those covered by the Rule to mitigate the public health concerns. Rule at 41313-14. Plaintiffs may have preferred a different outcome, but the question whether the Rule was justified notwithstanding the potential costs was DHS's decision to make, not Plaintiffs'. Relatedly, Plaintiffs urge that DHS unjustifiably relied on a belief that the Rule "will ultimately strengthen" public health. Opp'n at 20 (quoting Rule at 41314). But DHS did not rely on that statement as a justification for the Rule. Rather, the agency justified the Rule on the ground that it better accords with congressional intent and national immigration policy. Rule at 41316-19.

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concluded that those 24 million people "are likely to be nervous about applying for benefits, and *some portion* will in fact disenroll from benefit programs," *id*. at 2 (emphasis added), without predicting what portion that may be. Thus, the study is a particularly poor basis on which to fault DHS for not calculating the exact impact of the Rule on U.S. public health.

[4] *Prometheus Radio Project v. FCC*, cited by Plaintiffs, is not to the contrary. There, the court determined that the FCC drew a conclusion about the rules' effect on female ownership that "was not based on any record evidence [that the court] can discern." *Id*. at 585. Here, however, DHS expressly acknowledged the uncertainties regarding the impact of the Rule and explained why it was moving forward with the Rule despite those uncertainties. Rule at 41312-14.

C. DHS Adequately Responded to Public Comments.

1. Comments about the economic impacts of immigration.

DHS easily met its obligation to respond to comments on the proposed rule. *See Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) ("[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.'"). As to comments regarding the economic impacts of immigration generally, Opp'n at 20-22, DHS explained that it "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 acknowledge[d] that immigrants provide significant contribution to the United States as a whole and within their communities," but "the focus of the inquiry for public charge purposes is whether an individual alien, who is seeking to be admitted to the United States or who is applying for adjustment of status, is likely to become a public charge at any time in the future." *Id*. at 41306. Plaintiffs suggest that DHS was required to conduct an economic analysis of the impact of immigration on the overall U.S. economy, but such a study is not required by the APA and would be well outside the scope of the Rule. DHS is charged with enforcing the public-charge inadmissibility statute and the major purpose of the Rule was to define the statutory term "public charge." Mot. at 19.

Plaintiffs next fault DHS for not including as positive factors in the totality of the circumstances test "evidence of (a) immigrants' general disinclination to take public benefits and (b) the likelihood that immigrants' wages will rise faster than their citizen counterparts." Opp'n at 22. Plaintiffs apparently misunderstand how the Rule functions. The Rule employs a totality-of-the-circumstances test that considers facts about the particular alien seeking admission or adjustment of status to make an individualized determination about his or her likelihood of becoming a public charge. Rule at 41295; *id*. at 41306 ("This determination is made following consideration of the totality of the alien's individual circumstances[.]"). Information about the economic circumstances of immigrants generally are not pertinent to those individualized determinations.

2. Comments about credit scores.

Plaintiffs argue that DHS's decision to consider credit reports and scores when making public charge inadmissibility determinations was arbitrary and capricious and that DHS failed to respond to comments on this issue. Both arguments are meritless.

First, Plaintiffs' challenge to the use of credit reports and scores is based on Plaintiffs' incorrect belief that "[a] public-charge determination" does not assess "whether an applicant presently has limited financial means[.]" Opp'n at 23 (emphasis omitted). In fact, DHS is statutorily *required* to consider an alien's current "financial status," among other things, when making public charge inadmissibility determinations. 8 U.S.C. § 1182(a)(4). It was certainly not arbitrary or capricious for DHS to conclude that credit reports and scores are relevant evidence of a person's financial status. *See* Mot. at 19-20 (identifying the types of information provided by credit reports and scores which are relevant to financial status). Plaintiffs contend that credit scores "are a poor indicator of future self-sufficiency because they are designed to measure a borrower's short-term likelihood of making timely payments[.]" Opp'n at 23. But as DHS explained, credit scores provide an indication of the relative strength or weakness of an individual's financial status, and thus provide insight into whether the alien will be able to support himself or herself financially in the future. 83 Fed. Reg. 51114, at 51189; Rule at 41425-26. At bottom, Plaintiffs' argument is that DHS should not consider an alien's financial status when making public charge inadmissibility determinations, but that is an objection to the statute, not the Rule.

Plaintiffs also argue that credit reports may be "artificially low" or "inaccurate and therefore unreliable evidence of future financial status." Opp'n at 24. But DHS reasonably relied on the assessment of the Consumer Finance Protection Board that "[a] credit report generally is considered a reasonably reliable third-party record . . . for purposes of verifying items customarily found on a credit report, such as the consumer's current debt obligations, monthly debts, and credit history." Rule at 41426. Plaintiffs' disagreement with whether credit reports are sufficiently accurate to rely upon does not make the Rule arbitrary or capricious.

Lastly, Plaintiffs' argument that DHS failed to respond to comments on these subjects is

demonstrably incorrect. DHS extensively addressed such comments and easily met its obligation to respond. Rule at 41425-28. DHS's thorough response certainly enables the Court "to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did." *Pub. Citizen*, 988 F.2d at 197.

3. Comments about vagueness and disparate impact.

Plaintiffs concede that DHS provided a multi-part response to comments suggesting that the Rule is vague, and indeed made changes to the Rule to address such concerns, but Plaintiffs contend that the changes did not "cure the Rule's vagueness." Opp'n at 24-25. Defendants disagree that the Rule is vague, for the reasons discussed in Section IV.A. below, but there is no serious question that DHS adequately responded to comments about vagueness. Mot. at 21 (citing Rule at 41321). Plaintiffs may disagree with DHS's reasoning, but DHS did not fail to respond.

Likewise, there is no serious question that DHS adequately responded to comments that the Rule has a disparate impact on certain groups. Plaintiffs acknowledge that DHS's response "explain[ed] why, in its view, the Rule's disparate impact does not amount to an equal protection violation." Opp'n at 25. That Plaintiffs were not persuaded by the response does not suggest DHS failed adequately to respond. DHS's response allows the Court "to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did," which is all that is required by the APA. *Pub. Citizen*, 988 F.2d at 197; *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441–42 (D.C. Cir. 2012) ("An agency's obligation to respond to comments on a proposed rulemaking is "not 'particularly demanding.'").

D. The Rule is a Logical Outgrowth of the NPRM.

Plaintiffs argue that DHS failed to provide adequate notice of the Rule's 12/36 standard because that standard differed in certain ways from the standard proposed in the NPRM. Opp'n at 25-28. But it is well settled that a final rule "need not be the one proposed," and must "only be a logical outgrowth of its notice." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016). "A final rule is a logical outgrowth if affected parties should have anticipated that the relevant

modification was possible." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014).

Here, the 12/36 standard adopted by the Rule was a logical outgrowth of the standard proposed in the NPRM. In the NPRM, DHS proposed to:

> define public benefit to include a specific list of cash aid and noncash medical care, housing, and food benefit programs where either (1) the cumulative value of one or more such benefits that can be monetized (*i.e.*, where DHS can determine the cash value of such benefit) exceeds 15 percent of the Federal Poverty Guidelines (FPG) for a household of one within a period of 12 consecutive months based on the per-month FPG for the months during which the benefits are received (hereafter referred to as the 15 percent of FPG or the proposed 15 percent standard or threshold); or (2) for benefits that cannot be monetized, the benefits are received for more than 12 months in the aggregate within a 36-month period.

NPRM at 51158; *see also id*. at 51164-66. After receiving numerous comments on the proposed thresholds for the receipt of public benefits, including comments complaining that the 15 percent threshold for monetizable benefits was too complex, "DHS decided against finalizing separate thresholds for monetizable and non-monetizable benefits[.]" Rule at 41358. "Instead, DHS has determined that a better approach . . . is a single duration-based threshold[.]" *Id*.

The logical-outgrowth test is satisfied here because the NPRM specifically invited "public comments on whether the proposed 15 percent threshold applicable to monetizable public benefits is an appropriate threshold in light of the stated goals of the rule." NPRM at 51165. The NPRM further "welcome[d] the submission of views and data regarding whether the proposed standard is appropriate, too low, or too high for assessing reliance on public benefits (and why), and whether there is a more appropriate basis for a monetizable threshold, other than value as a percentage of the FPG or duration of receipt, that indicates whether an alien is a public charge." *Id*. Interested parties could fairly anticipate, then, that DHS might decide that the 15 percent threshold was not "an appropriate threshold," and that it might instead apply the durational threshold that already had been proposed for non-monetizable benefits.

This conclusion is buttressed by the fact that Plaintiffs fail even to argue that they would

have submitted different comments had the NPRM proposed the same 12/36 standard that was ultimately adopted. *See City of Waukesha v. EPA*, 320 F.3d 228, 246-47 (D.C. Cir. 2003) (failure to show comments would have been different suggests rule is a logical outgrowth of the proposal); *see Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000) ("[T]he 'logical outgrowth' test normally is applied to consider whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule."). As Plaintiffs observe, "commenters overwhelmingly argued that the NPRM's more lenient monetary threshold was *too low*[.]" Opp'n at 27. Accordingly, those commenters would similarly oppose the elimination of the monetary threshold for the same reasons they opposed the 15 percent threshold.[5]

IV. THE COURT SHOULD DISMISS PLAINTIFFS' CONSTITUTIONAL CLAIMS.

A. The Rule Does Not Violate Due Process.

Plaintiffs do no dispute that a Fifth Amendment Due Process claim may only be premised on the deprivation of a cognizable liberty or property interest. They admit that there is "no entitlement to any type of immigration benefit or relief." Opp'n at 28. They nevertheless contend that there is a generally applicable "liberty interest in being and remaining in the United States." *Id.* (citation omitted). Plaintiffs' argument suggests that this purported interest applies to all non-citizens in all interactions with the United Stated government related to immigration, and is simply unsupported by the law. Plaintiffs principally rely on *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903), but at no point in the nearly 120 years since that decision, has the right recognized in

[5] Plaintiffs' cited cases are easily distinguishable. In *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983), the court concluded that EPA did not give adequate notice that it might require a refinery, to qualify as "small," not to have been owned or controlled by a large refiner after July 1, 1981. The requirement "derive[d] from a single comment," and would not have been anticipated based on a "general notice that [EPA] might make unspecified changes in the definition of small refinery." *Id.* at 548, 549. Also, *North Carolina Growers' Association v. UFW*, 702 F.3d 755 (4th Cir. 2012) does not discuss the logical-outgrowth doctrine at all. There, the court found that the agency "did not provide a meaningful opportunity for comment, and did not solicit or receive relevant comments regarding the substance or merits of either set of regulations[.]"

that case ever been extended to discretionary immigration decisions—even to discretionary relief from deportation itself. *See, e.g.*, *Smith v. Ashcroft*, 295 F.3d 425, 431 (4th Cir. 2002). Indeed, all of the subsequent cases cited by Plaintiff recognize such rights only in the context of removal proceedings. *See Dimaya v. Sessions*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring); *Bridges v. Wixon*, 326 U.S. 135, 137-140 (1945).

Plaintiffs' attempt to transform the inadmissibility determination of the public-charge statute into a removability determination made in removal proceedings, Opp'n at 29, illustrates the inapplicability of their asserted liberty interest to the Rule's discretionary determination whether an alien should be permitted to adjust status. Plaintiffs have admitted that there is no entitlement to *any type* of immigration relief or benefit and, therefore, that those determinations cannot be the source of any Due Process right. Although a determination of inadmissibility under the public-charge statute, based on the specifications established by the Rule, may render an alien removable, no alien will be removed without further process on that basis. Removal proceedings before an immigration judge are a separate and well-established area of immigration in which certain Due Process rights are recognized and various procedures are required. 8 U.S.C. § 1229a; *see Reno v. Flores*, 507 U.S. 292, 306 (1993) ("the Fifth Amendment entitles aliens to due process of law in deportation proceedings"). If Plaintiffs' apparent argument—that a cognizable liberty interest arises from any immigration decision or procedure that could possibly result in a discretionary determination to initiate removal proceedings—were accepted, it would entirely upend the existing immigration system. The *Landon v. Plasencia*, 459 U.S. 21 (1982), and *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), cases invoked by Plaintiffs are inapposite, as the reasoning in those cases was explicitly limited to situations of lawful permanent residents returning to the United States after absences in foreign countries. *See Plasencia*, 459 U.S. at 33-35 (discussing the factually dependent nature of the Due Process question in both *Chew* and the instant case).

Plaintiffs' claim must be dismissed on the basis of their failure to identify any Due Process right on which to base their vagueness claim. However, even if the Court were to proceed to the merits of this claim, it would fail because the Rule is not unconstitutionally vague. 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). Plaintiffs complain about Defendants' "virtually unconstrained discretion" under the Rule, Opp'n at 30, but that discretion (however characterized) is afforded by the public-charge statute itself. *See* 8 U.S.C. § 1182(a)(4).[6] The final Rule provides a "single, objective duration-based threshold applicable to the receipt of all included public benefits," Rule at 41321, which provides far more "fair notice to [aliens] about what conduct 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.

Finally, Plaintiffs' argument about the 1999 Interim Field Guidance is a red herring. The Rule gives far more notice and context to aliens to understand the public-charge determination than the sweeping and non-specific "primarily dependent" language set forth in the Field Guidance. However, even if it did not, the relative specificity of current and a prior regulatory interpretations is not the standard by which constitutionality is measured. An enactment only violates due process "if it is 'so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.'" *Boggala v. Sessions*, 866 F.3d 563, 569 (4th Cir. 2017) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015)). The Supreme Court has characterized such statutes by their "hopeless indeterminacy" and "repeated attempts and repeated failures to craft a principled and objective standard." *Id.* Plaintiffs have not demonstrated that the Rule independently meets this test.

[6] Plaintiffs' other complaints about the confusion allegedly caused by the Rule are similarly baseless. First, the Rule's prediction of future public benefit use is not "complicated" by the fact that many aliens are ineligible to receive those benefits. Opp'n at 30. If an alien has not used Public Benefits in the period prior to an application subject to a Public Charge inadmissibility determination, then benefits use simply will not be a factor in the totality-of-the-circumstances analysis. Nor is the fact that U.S. citizens and existing LPRs use public benefits, *Id.*, relevant to the analysis used by the Rule.

B. The Rule Does Not Violate Equal Protection.

To establish an equal protection claim, Plaintiffs must show that the "decisionmaker"—here, DHS—"selected" the "course of action" at issue "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Here, aside from a conclusory allegation of discriminatory intent, Plaintiffs largely rely upon generic statements from those who did not make the contested decision here (the decision to enact the Rule). These allegations are insufficient.

As a threshold matter, Supreme Court "cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Thus, with respect to immigration policy, a highly "deferential standard of review" applies because "it is not the judicial role in cases of this sort to probe and test the justifications of" the executive branch. *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018). "A conventional application of" this standard asks "only whether the policy is facially legitimate and bona fide." *Id*. at 2420. In response, Plaintiffs argue that *Hawaii*'s narrow standard applies only in the national-security context and does not apply to cases involving aliens in the United States. That is incorrect. The *Hawaii* decision explained that the deferential standard was appropriate for cases involving "the admission and exclusion of foreign nationals," an area which is "largely immune from judicial control." *Id*. at 2418. There is no question that this case—which challenges DHS's interpretation of the public-charge *inadmissibility* statute—directly implicates the federal government's policies regarding the admission of aliens. The fact that an alien seeking adjustment of status may be physically present in the United States is irrelevant because "[i]t is a well established fact that an applicant for adjustment of status under Section 245 of the Act is in the same posture as though he were an applicant before an American consular officer abroad seeking issuance of an immigrant visa for the purpose of gaining admission to the United States as a lawfully permanent resident." *Matter of Harutunian*, 14 I. & N. Dec. 583, 589 (Reg'l Comm'r Feb. 28, 1974). Regardless of an alien's location, DHS determinations under 8 U.S.C. § 1182(a)(4) are determinations about

admissibility, which is required for applicants seeking adjustment of status under 8 U.S.C. § 1255.[7]

Furthermore, the Supreme Court in *Hawaii* expressly stated that the deferential standard applies "across different contexts and constitutional claims." 138 S. Ct. at 2419. For authority, the Supreme Court cited *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008), a case involving an equal protection challenge brought by aliens *inside* the country. The Court also cited *Fiallo*, a paternity/legitimacy case in which the Court had rejected the same type of reasoning as advanced by Plaintiffs here. *See Fiallo*, 430 U.S. at 796 (rejecting characterization of "prior immigration cases as involving foreign policy matters and congressional choices to exclude or expel groups of aliens that were specifically and clearly perceived to pose a grave threat to the national security . . . or to the general welfare of this country"). And the Supreme Court quoted its prior ruling that "*any* policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power." *Id*. (quoting *Harisiades v. Shaughnessy*, 342 U. S. 580, 588-89 (1952)) (emphasis added).

Plaintiffs fail to state an equal-protection claim under the *Hawaii* standard, or even a less deferential standard. First, Plaintiffs reference a single comment by Mr. Cuccinelli—then Acting Director of USCIS—made during an interview in response to an abstract question concerning the meaning of the poem *The New Colossus*.[8] This statement says nothing of why Mr. Cuccinelli supports the Rule, and elsewhere in the interview Mr. Cuccinelli specifically (and repeatedly) states that he supports the Rule because "self-sufficiency is a central part of America's proud heritage," and that "all [the Rule] does" is reflect the principle that "people coming to this country"

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

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

are "expected to be able to support themselves." *See* CNN, *Burnett challenges Cuccinelli on new immigration rule*, YouTube (Aug. 13, 2019).

Plaintiffs then cite to a number of generic statements from the President and Stephen Miller that, Plaintiffs believe, suggest animus. *See* Resp., at 33-4. But none of these statements references the Rule. The Supreme Court has recently clarified that "statements . . . remote in time and made in unrelated contexts . . . do not qualify as 'contemporary statements' probative of the decision at issue," and thus "fail to raise a plausible inference that the [the decision] was motivated by animus." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, No. 18-587, 2020 WL 3271746, at *16 (U.S. June 18, 2020). And more fundamentally, neither the President nor Mr. Miller was the Rule's "decisionmaker[]." *Id.* at *11, 16 (for the equal protection challenge to DACA, "[t]he relevant actors were most directly Acting Secretary Duke and the Attorney General," since Duke made the challenged decision and, under the relevant statute, "she was bound by the Attorney General's legal determination."). Their statements say nothing of why DHS enacted the Rule, and thus they do not support an equal protection challenge to the Rule.

Finally, Plaintiffs claim that their allegation of disproportionate impact gives rise to an inference of animus. *See* Opp'n at 32. Although in very limited circumstances, disproportionate impact alone may be probative of intent, "such cases are rare," and plaintiffs must usually produce "other evidence." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Here, the elaborate, non-discriminatory justifications laid out in the Rule's preamble—spanning over two hundred pages—preclude any inference that any disproportionate impact is suggestive of discriminatory intent. Accordingly, Plaintiffs have no well-pled allegation of discriminatory intent, and thus they have failed to state a plausible equal protection claim.

CONCLUSION

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

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