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14 **IN THE UNITED STATES DISTRICT COURT**
 15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 _____)
 17 LA CLINICA DE LA RAZA, *et al.*,)

18 Plaintiffs,)

19 v.)

20 DONALD J. TRUMP, *et al.*)

21 Defendants.)
 22 _____)
 23

Case No. 4:19-cv-04980-PJH

**DEFENDANTS' MOTION
 TO DISMISS THE AMENDED
 COMPLAINT**

Date: July 29, 2020

Time: 9:00 am

Courtroom: 3

Judge: Hon. Phyllis J. Hamilton

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1 United States [is] that aliens within the Nation’s borders not depend on public resources to meet
2 their needs.” *Id.* § 1601(2)(A). Rather, aliens must “rely on their own capabilities and the resources
3 of their families, their sponsors, and private organizations.” *Id.* Relatedly, “the availability of
4 public benefits [is] not [to] constitute an incentive for immigration to the United States.” *Id.* §
5 1601(2)(B).

6 These statutorily enumerated policies are effectuated in part through the public charge
7 ground of inadmissibility in the INA. With certain exceptions, the INA provides that “[a]ny alien
8 who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of
9 the Attorney General, or the Secretary of Homeland Security, at the time of application for
10 admission or adjustment of status, is likely at any time to become a public charge is inadmissible.”
11 8 U.S.C. § 1182(a)(4)(A). An unbroken line of predecessor statutes going back to at least 1882
12 have contained a similar inadmissibility ground for public charges, and those statutes have, without
13 exception, delegated to the Executive Branch the authority to determine who constitutes a public
14 charge for purposes of that provision. *See* Immigration Act of 1882, 47th Cong. ch. 376, §§ 1-2,
15 22 Stat. 214 (“1882 Act”); 1891 Immigration Act, 51st Cong. ch. 551, 26 Stat. 1084 (“1891 Act”);
16 Immigration Act of 1907, 59th Cong. ch. 1134, 34 Stat. 898 (“1907 Act”); Immigration Act of
17 1917, 64th Cong. ch. 29 § 3, 39 Stat. 874, 876 (“1917 Act”); INA of 1952, 82nd Cong. ch. 477,
18 section 212(a)(15), 66 Stat. 163, 183 (1952). Indeed, in a Report leading up to the enactment of
19 the INA, the Senate Judiciary Committee emphasized that because “the elements constituting
20 likelihood of becoming a public charge are varied, there should be no attempt to define the term
21 in the law,” and that the public charge inadmissibility determinations properly “rest[] within the
22 discretion of” the Executive Branch. S. Rep. No. 81-1515, at 349 (1950).

23 In 1996, Congress enacted immigration and welfare reform statutes that bear on the public
24 charge inadmissibility determination. The Illegal Immigration Reform and Immigrant
25 Responsibility Act of 1996 (“IIRIRA”), Division C of Pub. L. No. 104-208, 1110 Stat. 3009-546
26 (1996) strengthened the enforcement of the public charge inadmissibility ground in several ways.
27 First, Congress instructed that, in making public charge inadmissibility determinations, “the
28 consular officer or the Attorney General shall at a minimum consider the alien’s: (1) age; (2)

1 health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills,”
2 8 U.S.C. § 1182(a)(4)(B), but otherwise left in place the broad delegation of authority to the
3 Executive Branch to determine who constitutes a public charge. IIRIRA also raised the standards
4 and responsibilities for individuals who must “sponsor” an alien by pledging to provide support to
5 maintain that immigrant at the applicable threshold for the period of enforceability and requiring
6 that sponsors demonstrate the means to maintain an annual income at the applicable threshold.
7 Contemporaneously, the Personal Responsibility and Work Opportunity Reconciliation Act of
8 1996 (“PRWORA”), Pub. L. No. 104-193, 110 Stat. 2105, restricted most aliens from accessing
9 many public support programs, including Supplemental Security Income (“SSI”) and nutrition
10 programs. PRWORA also made the sponsorship requirements in IIRIRA legally enforceable
11 against sponsors.

12 In light of the 1996 legislative developments, the legacy Immigration and Naturalization
13 Service (“INS”) started in 1999 to engage in formal rulemaking to guide immigration officers,
14 aliens, and the public in understanding public charge inadmissibility determinations. *See*
15 *Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28676 (May 26, 1999)
16 (“1999 NPRM”). No final rule was ever issued, however. Instead, the agency adopted the 1999
17 NPRM interpretation on an interim basis by publishing *Field Guidance on Deportability and*
18 *Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999) (“Field
19 Guidance”). The Field Guidance dramatically narrowed the public charge inadmissibility ground
20 by defining “public charge” as an alien who is likely to become “primarily dependent on the
21 government for subsistence,” and by barring immigration officers from considering any non-cash
22 public benefits, regardless of the value or length of receipt, as part of the public charge
23 inadmissibility determination. *See id.* at 28689. Under that standard, an alien receiving Medicaid
24 (other than for institutionalization for long-term care), food stamps, and public housing, but not
25 cash assistance, would have been treated as no more likely to become a public charge than an alien
26 who was entirely self-sufficient.

27 The Rule revises this approach and adopts, through notice-and-comment rulemaking, a
28 well-reasoned definition of public charge providing practical guidance to DHS officials making

1 public charge inadmissibility determinations. DHS began by publishing a Notice of Proposed
2 Rulemaking, comprising 182 pages of description, evidence, and analysis. *See Inadmissibility on*
3 *Public Charge Grounds*, 83 Fed. Reg. 51114 (Oct. 10, 2018) (“NPRM”). The NPRM provided a
4 60-day public comment period, during which 266,077 comments were received. *See* Rule at 41297.
5 After considering these comments, DHS published the Rule, addressing comments, making several
6 revisions to the proposed rule, and providing over 200 pages of analysis in support of its decision.
7 Among the Rule’s major components are provisions defining “public charge” and “public benefit”
8 (which are not defined in the statute), an enumeration of factors to be considered in the totality of
9 the circumstances when making a public charge inadmissibility determination, and a requirement
10 that aliens seeking an extension of stay or a change of status show that they have not received
11 public benefits in excess of the Rule’s threshold since obtaining nonimmigrant status. The Rule
12 supersedes the Interim Field Guidance definition of “public charge,” establishing a new definition
13 based on a minimum time threshold for the receipt of public benefits. Under this “12/36 standard,”
14 a public charge is an alien who receives designated public benefits for more than 12 months in the
15 aggregate within a 36-month period. *Id.* at 41297. Such “public benefits” are extended by the Rule
16 to include many non-cash benefits: with some exceptions, an alien’s participation in the
17 Supplemental Nutrition Assistance Program (“SNAP”), Section 8 Housing Programs, Medicaid,
18 and Public Housing may now be considered as part of the public charge inadmissibility
19 determination. *Id.* at 41501-02. The Rule also enumerates a non-exclusive list of factors for
20 assessing whether an alien is likely at any time in the future to become a public charge and explains
21 how DHS officers should apply these factors as part of a totality of the circumstances
22 determination.¹

23 STANDARD OF REVIEW

24 To survive a challenge under Federal Rule of Civil Procedure 12(b)(6), a complaint must
25 have sufficient factual allegations to state a claim that is “plausible on its face.” *Bell Atl. Corp. v.*
26

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

1 *Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard “asks for more than a sheer
 2 possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
 3 The plaintiff must provide “more than labels and conclusions, and a formulaic recitation of the
 4 elements of a cause of action will not do,” *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678; *see*
 5 *also Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (“[T]he court is not
 6 required to accept legal conclusions cast in the form of factual allegations if those conclusions
 7 cannot reasonably be drawn from the facts alleged. Nor is the court required to accept as true
 8 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
 9 inferences.”) (citations and internal quotation marks omitted).

10 ARGUMENT

11 **I. Plaintiffs Have Not Established Standing or Ripeness**

12 The Court should dismiss the Amended Complaint, first, because Plaintiffs have not
 13 established standing or ripeness. Standing is “an essential and unchanging part of the case-or-
 14 controversy requirement of Article III.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). “To
 15 seek injunctive relief, a plaintiff must show that [it] is under threat of suffering ‘injury in fact’ that
 16 is concrete and particularized; the threat must be actual and imminent, not conjectural or
 17 hypothetical; it must be fairly traceable to the challenged action . . . ; and it must be likely that a
 18 favorable judicial decision will prevent or redress the injury.” *Summers v. Earth Island Inst.*, 555
 19 U.S. 488, 493 (2009). The “threatened injury must be certainly impending to constitute injury in
 20 fact”; allegations of “possible future injury do not satisfy . . . Art. III.” *Whitmore v. Ark.*, 495 U.S.
 21 149, 158 (1990). Where, as here, “the plaintiff is not [itself] the object of the government action,”
 22 standing “is ordinarily ‘substantially more difficult’ to establish.” *Lujan*, 504 U.S. at 562.

23 In its PI Order, the Court found that Plaintiffs had standing based on an “organizational”
 24 standing theory.² Generally, “[a]n organization suing on its own behalf can establish an injury
 25

26 ² Plaintiffs’ Amended Complaint states that California Primary Care Association (“CPCA”) brings
 27 suit in a representational capacity, but CPCA has neither alleged nor provided evidence in support
 28 of the requirements for associational standing. *See, e.g., Fleck & Assocs. v. City of Phoenix*, 471
 F.3d 1100, 1105-06 (9th Cir. 2006).

1 when it suffered both a diversion of its resources and a frustration of its mission.” *La Asociacion*
2 *de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).
3 However, the organization “must . . . show that it would have suffered some other injury if it had
4 not diverted resources to counteracting the problem.” *Id.*; *see also id.* at 1088 n.4 (“An organization
5 may sue only if it was forced to choose between suffering an injury and diverting resources to
6 counteract” it.). The alleged injury it seeks to counteract must be “more than simply a setback to
7 the organization’s abstract social interests.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379
8 (1982). Plaintiffs must show that the challenged “conduct perceptibly impaired the organization’s
9 ability to provide services,” not just that its “mission has been compromised” in the abstract. *Food*
10 *& Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015). The organization “cannot
11 manufacture the injury by . . . simply *choosing* to spend money.” *La Asociacion*, 624 F.3d at 1088
12 (emphasis added). Neither the health care Plaintiffs, nor the legal assistance Plaintiffs, meet this
13 standard.³

14 Here, the health care Plaintiffs’ “missions are to provide high quality health care to low-
15 income and immigrant communities,” and the legal assistance Plaintiffs’ “missions are to provide
16 advocacy and/or legal services to their clients and members.” PI Order at 84. Plaintiffs assert that
17 the Rule cuts against their ultimate policy goals, and that they have expended or will expend
18 additional resources in response to the Rule. *See id.* at 84-85. But these allegations are insufficient
19 to establish organizational standing. Importantly, Plaintiffs identify no injury they will suffer if
20 they do *not* divert resources towards addressing these concerns, apart from a purported harm to
21 their “abstract social interest” in better health care, or an increased number of successful
22 immigration benefit applications, for immigrant communities. There is no allegation, for example,
23 that a failure to divert resources will result in staff shortages, or otherwise compromise their ability
24 to administer health or legal services to those requesting them.

26 ³ The health care Plaintiffs include La Clinica de la Raza, CPCA, and Maternal and Child Health
27 Access. The legal assistance Plaintiffs include Farmworker Justice, Council on American Islamic
28 Relations-California, African Communities Together, Legal Aid Society of San Mateo County,
Central American Resource Center, and Korean Resource Center.

1 In concluding that the Plaintiffs had standing to seek preliminary relief, the Court noted
2 that “it is enough for plaintiffs to allege that their goals . . . are frustrated, and that the challenged
3 policy has stimulated the organizations into spending money on things they would not otherwise
4 have spent money on.” PI Order at 85. But this is inconsistent with the Ninth Circuit’s decision in
5 *La Asociacion*, where the court stated that an organization does not have standing simply because
6 it “*cho[se]* to spend money” in furtherance of its mission; the organization must establish that “it
7 would have suffered from other” concrete injury to its activities. 624 F.3d at 1088 (emphasis
8 added). Indeed, if the Court were correct that an organization may have standing whenever its
9 abstract goals are frustrated, and it elects to spend resources as a result, then an enterprising social
10 interest organization could manufacture standing to challenge virtually any change in federal
11 policy.

12 “Constitutional ripeness,” another prerequisite of justiciability, “is often treated under the
13 rubric of standing because ‘ripeness coincides squarely with standing’s injury in fact prong.’”
14 *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1153 (9th Cir. 2017) (quoting *Thomas v.*
15 *Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)). “Ripeness can
16 be characterized as standing on a timeline,” *Thomas*, 220 F.3d at 1138, and ripeness precludes
17 “premature” review where “the injury at issue is speculative, or may never occur.”
18 *ProtectMarriage.com – Yes on 8 v. Bowen*, 752 F.3d 827, 838 (9th Cir. 2014). For the same reasons
19 stated above regarding Plaintiffs’ lack of standing, Plaintiffs’ claims fail to satisfy the requirements
20 of constitutional ripeness. *See, e.g., Clark v. City of Seattle*, 899 F.3d 802, 809 (9th Cir. 2018).

21 Prudential ripeness also counsels against consideration of Plaintiffs’ claims. This doctrine
22 “protect[s] agencies from judicial interference until an administrative decision has been formalized
23 and its effects felt in a concrete way by the challenging parties.” *Habeas Corpus Res. Ctr. v. U.S.*
24 *DOJ*, 816 F.3d 1241, 1252 (9th Cir. 2016). “In resolving ripeness questions, courts examine the
25 ‘fitness of the issues for judicial decision’ and the ‘hardship to the parties of withholding court
26 consideration.’” *Id.* Fitness is generally lacking where the reviewing court “would benefit from
27 further factual development of the issues presented.” *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S.
28 726, 733 (1998). Here, Plaintiffs’ claims are all premised on speculation about the potential future

1 effects of the Rule and disagreement with DHS’s predictions based on the available evidence. *See,*
2 *e.g.*, PI Mot., ECF No. 35, at 17, 20-21, 22. “Judicial appraisal of these [questions]” should await
3 the “surer footing [of] the context of a specific application of this regulation,” such as an actual
4 application of the public charge ground of inadmissibility to an alien under the Rule as well as
5 experience and statistical evidence regarding the actual implementation and its statistical effects
6 on individuals’ decision-making. *Colwell v. HHS*, 558 F.3d 1112, 1127 (9th Cir. 2009).

7 Additionally, withholding judicial consideration of Plaintiffs’ claims will not cause them
8 any significant hardship. With respect to the organizations bringing this case, the Rule “do[es] not
9 create adverse consequences of a strictly legal kind, that is, effects of a sort that traditionally would
10 have qualified as harm,” and therefore cannot serve as the basis for a ripe claim. *Ohio Forestry*
11 *Ass’n*, 523 U.S. at 733. Instead, the harms alleged are possible cumulative side effects of third
12 party individuals’ decisions to take action not required by the Rule, so they do not create a ripe
13 facial challenge.

14 **II. Plaintiffs Are Outside the Zone Of Interests Regulated By the Rule**

15 Plaintiffs’ claims are outside the zone of interests served by the limits of the “public
16 charge” inadmissibility provision in § 1182(a)(4)(A) and related sections. The “zone-of-interests”
17 requirement limits the plaintiffs who “may invoke [a] cause of action” to enforce a particular
18 statutory provision or its limits. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S.
19 118, 129-30 (2014). Under the APA, a plaintiff falls outside this zone when its “interests are . . .
20 marginally related to or inconsistent with the purposes implicit in the statute,” *Clarke v. Sec. Indus.*
21 *Ass’n*, 479 U.S. 388, 399 (1987), and “the relevant statute” for this analysis “is the statute whose
22 violation is the gravamen of the complaint.” *Air Courier Conference v. Am. Postal Workers Union*,
23 498 U.S. 517, 529 (1991).

24 As the Court concluded in its PI Order, Plaintiffs fall outside the zone of interests of the
25 public charge inadmissibility statute. *See* PI Order at 72 (“[T]he organizations simply fail to
26 explain how their interests relate to § 1182(a)(4)’s purpose of excluding immigrants likely to
27 become public charges”). It is aliens improperly determined to be inadmissible, not organizations
28

1 seeking to assist them, who “fall within the zone of interests protected” by any limitations implicit
 2 in § 1182(a)(4), because they are the “reasonable—indeed, predictable—challengers” to DHS’s
 3 inadmissibility decisions.⁴ Additionally, Plaintiffs “must establish that the *injury* [they] complain
 4 of . . . falls within the ‘zone of interests’ sought to be protected by the statutory provision.” *Lujan*
 5 *v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883 (1990) (emphasis added). Plaintiffs do not and cannot
 6 allege that Congress intended to allow suits to remedy the harm alleged here: increased
 7 organizational resource expenditures. Indeed, the organizations seek to increase alien enrollment
 8 in government benefits, an activity that is inconsistent with the statutory provision’s purpose.
 9 Justice O’Connor, in a chambers opinion, thus confirmed that particular INA provisions were
 10 “clearly meant to protect the interests of undocumented aliens, not the interests of organizations
 11 [that provide legal help to immigrants],” and that the fact that a “regulation may affect the way an
 12 organization allocates its resources . . . does not give standing to an entity which is not within the
 13 zone of interests the statute meant to protect.” *INS v. Legalization Assistance Proj.*, 510 U.S. 1301,
 14 1302, 1304-05 (1993) (O’Connor, J., in chambers).

15 **III. The Rule is Consistent with the Public Charge Inadmissibility Statute**

16 Plaintiffs allege that the Rule’s definition of “public charge” is “contrary to the plain and
 17 well established meaning of that phrase, and to how it has been interpreted and applied since 1882,”
 18 and that the Rule adopts an “unreasonable interpretation” of the term. Am. Compl. ¶¶ 186-87. But
 19 as the Ninth Circuit recently held, the Rule’s definition of “public charge” is well within the bounds
 20 of the statute. *San Francisco*, 944 F.3d at 799 (“We conclude that DHS’s interpretation of ‘public
 21 charge’ is a permissible construction of the INA.”).

22 The Ninth Circuit made four principal observations: (1) that the word “opinion” is classic
 23 “language of discretion,” under which immigration “officials are given broad leeway”; (2) that
 24 “public charge” is neither a “term of art” nor “self-defining,” and is thus ambiguous under *Chevron*
 25

26 ⁴ Plaintiffs’ Fifth Amendment claims fail the zone of interests test even more baldly. The Supreme
 27 Court has suggested that a heightened zone-of-interests requirement must be met by a plaintiff
 28 seeking to enforce the law through an implied cause of action in equity and that the plaintiff must
 show the provision is intended for his “*especial* benefit.” *Clarke*, 479 U.S. at 396 & n.16.

1 as “capable of a range of meanings”; (3) that Congress set out five factors for consideration but
2 expressly did not limit officials to those factors, which gave officials “considerable discretion”;
3 and (4) that Congress granted DHS the power to adopt regulations, by which “Congress intended
4 that DHS would resolve any ambiguities in the INA.” *Id.* at 791-92.

5 Following these observations and a comprehensive, detailed account of the history of the
6 “public charge” provision, *id.* at 792-97, the Ninth Circuit had little trouble concluding either that
7 “the phrase ‘public charge’ is ambiguous,” *id.* at 798, or that “DHS’s interpretation of ‘public
8 charge’ is a permissible construction of the INA,” *id.* at 799. The same result should follow here,
9 and Count One should be dismissed.

10 There are additional reasons, not expressly relied on by the Ninth Circuit, why the Rule is
11 consistent with the INA. First, Congress expressly instructed that, when making a public charge
12 inadmissibility determination, DHS “shall not consider any benefits the alien may have received,”
13 8 U.S.C. § 1182(s), including various noncash benefits, if the alien “has been battered or subjected
14 to extreme cruelty in the United States by [specified persons],” *id.* § 1641(c); *see also id.* §§ 1611-
15 1613 (specifying the public benefits for which battered aliens and other qualified aliens are
16 eligible). The prohibition on considering a battered alien’s receipt of public benefits presupposes
17 that DHS would, ordinarily, consider the past receipt of benefits in making public charge
18 inadmissibility determinations. *Cf. Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1844
19 (2018) (“There is no reason to create an exception to a prohibition unless the prohibition would
20 otherwise forbid what the exception allows.”).

21 In addition, Congress mandated that many aliens seeking admission or adjustment of status
22 submit a Form I-864, Affidavit of Support Under Section 213A of the INA, executed by a sponsor
23 to avoid a public charge inadmissibility determination. *See* 8 U.S.C. § 1182(a)(4)(C) (requiring
24 most family-sponsored immigrants to submit enforceable affidavits of support); § 1182(a)(4)(D)
25 (same for certain employment-based immigrants), § 1183a (affidavit of support requirements).
26 Aliens who fail to submit a required affidavit of support are inadmissible on the public charge
27 ground by operation of law, regardless of their individual circumstances. *Id.* § 1182(a)(4).
28 Congress further specified that the sponsor must agree “to maintain the sponsored alien at an

1 annual income that is not less than 125 percent of the Federal poverty line,” *id.* § 1183a(a)(1)(A),⁵
 2 and it granted federal and state governments the right to seek reimbursement from the sponsor for
 3 “any means-tested public benefit” that the government provides to the alien during the period of
 4 enforceability, *id.* § 1183a(b)(1)(A); *see also id.* § 1183a(a) (affidavits of support are legally
 5 binding and enforceable contracts “against the sponsor by the sponsored alien, the Federal
 6 Government, any State (or any political subdivision of such State), or by any other entity that
 7 provides any means-tested public benefit”).

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

17 **IV. The Rule is Not Arbitrary or Capricious**

18 Count Two of Plaintiffs’ Amended Complaint alleges that the Rule is arbitrary and
 19 capricious in violation of the APA for various reasons. *See* Am. Compl. ¶¶ 188-200. Count Two
 20 should be dismissed because none of the theories alleged in the Amended Complaint plausibly
 21 suggest the Rule is arbitrary or capricious.

22 **A. The Rule Meets the Standards Required For An Agency To Change Its Position** 23 **Through Notice-and-Comment Rulemaking**

24 Plaintiffs allege that the Rule is arbitrary and capricious because it allegedly “departs from
 25 decades of prior law and practice[.]” Am. Compl. ¶ 190. As discussed above in Section III, the

26
 27 ⁵ Sponsors who are on active duty (other than active duty for training) in the Armed Forces of the
 28 United States must demonstrate the means to maintain an annual income equal to at least 100
 percent of the Federal poverty line. 8 U.S.C. § 1183a(f)(3).

1 Rule is consistent with prior law regarding public charge inadmissibility. Although the Rule
 2 departs in some ways from the 1999 Field Guidance, the “fact that DHS has changed policy does
 3 not substantially alter the burden in the challengers’ favor.” *San Francisco*, 944 F.3d at 801. It is
 4 well-settled that there is “no basis in the Administrative Procedure Act . . . for a requirement . . .
 5 [of] more searching review” when an agency changes its position. *FCC v. Fox Television Stations,*
 6 *Inc.*, 556 U.S. 502, 514 (2009). And there is certainly no basis to find that the agency’s prior
 7 interpretation in nonbinding guidance could possibly foreclose DHS from adopting a different
 8 reasonable interpretation through notice-and-comment rulemaking. *See Nat’l Cable & Telecomms.*
 9 *Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). As the Supreme Court explained
 10 in *Fox*, all that DHS was required to do to permissibly change course from the 1999 Field Guidance
 11 was to acknowledge that the Rule is adopting a policy change, provide a reasoned explanation for
 12 the change, and explain how it believes the new interpretation is reasonable. *See Fox*, 556 U.S.
 13 514-16. The Ninth Circuit ruled that DHS met this standard because it “adequately explained the
 14 reasons for the Final Rule[.]” *San Francisco*, 944 F.3d at 805.

15 Also, contrary to Plaintiffs’ allegation, Am. Compl. ¶ 191, the Rule plainly provided good
 16 reasons for the new policy. DHS explained that the “primary benefit of the final rule would be to
 17 better ensure that aliens who are admitted to the United States, seek extension of stay or change of
 18 status, or apply for adjustment of status are not likely to receive public benefits and will be self-
 19 sufficient, *i.e.*, individuals will rely on their own financial resources, as well as the financial
 20 resources of the family, sponsors, and private organizations.” Rule at 41486 (citing 8 U.S.C. §
 21 1601(2)); *see also id.* at 41295, 41306-07.

22 **B. The Rule Considers Relevant Factors in Assessing an Alien’s Likelihood of**
 23 **Becoming a Public Charge**

24 Plaintiffs also allege that the factors DHS considers pursuant to the Rule in making public
 25 charge inadmissibility determinations “are not reasonably related to determining whether an
 26 individual is likely to become a public charge.” Am. Compl. ¶ 193; *see also id.* ¶ 6 (raising this
 27 argument as to English proficiency and credit scores). But DHS explained, at length, its reasons
 28 for including in the Rule the various factors it identified as weighing on the question whether an

1 alien is likely at any time in the future to become a public charge. NPRM at 51178-207. The factors
2 implemented Congress’s mandate that the agency consider, at a minimum, each alien’s “age”;
3 “health”; “family status”; “assets, resources, and financial status”; and “education and skills” in
4 making a public charge inadmissibility determination. *See id.* at 51178; 8 U.S.C. § 1182(a)(4)(B).
5 DHS described in detail how each of the various factors bear positively or negatively on the
6 determination of whether an alien is likely to receive public benefits for more than 12 months in
7 the aggregate within any 36 month period at any time in the future, while retaining the “totality of
8 the circumstances” approach that allows each adjudicating officer to make a decision appropriate
9 to each alien’s particular circumstances.

10 For example, in concluding that English proficiency was a relevant factor in the public
11 charge inadmissibility calculus, DHS cited Census Bureau data and other studies indicating that
12 non-English speakers earned considerably less money and were more likely to be unemployed than
13 English speakers, thus supporting the conclusion that non-English speakers were more likely to
14 become public charges than their English-proficient counterparts. NPRM at 51195-96. DHS also
15 cited evidence indicating that noncitizens who reside in households where English is spoken “[n]ot
16 well” or “[n]ot at all” received public benefits at much higher rates than noncitizens residing in
17 households where English was spoken “[w]ell” or “[v]ery well,” lending further support to the
18 conclusion that English proficiency is a relevant consideration in the public charge inadmissibility
19 determination. *Id.* at 51196. The Rule’s suggested reliance on an alien’s credit score was likewise
20 not irrational. Credit scores provide an indication of the relative strength or weakness of an
21 individual’s financial status, and thus provide insight into whether the alien will be able to support
22 himself or herself financially in the future. *Id.* at 51189; Rule at 41425.

23 **C. The Rule’s Totality of the Circumstances Test is Not Vague**

24 Plaintiffs also allege that “Defendants failed to consider that the factors are so vague they
25 invite arbitrary or discriminatory enforcement.” Am. Compl. ¶ 194. The Court previously rejected
26 this claim, noting that “[t]he precise nature of the procedural challenge is unclear here, but the
27 underlying statute requires consideration of ‘at minimum’ five factors, and then specifically
28 mentions another factor that ‘may’ be considered.” PI Order at 65. “Moreover, the statute

1 specifically targets those who are likely to be a public charge ‘in the opinion of the Attorney
2 General,’ who as DHS recognized has long been given discretion to make such determinations
3 under the statute.” *Id.*

4 To the extent Plaintiffs are suggesting DHS failed to consider comments raising concerns
5 about vagueness, Plaintiffs are wrong. DHS explained that the NPRM had “provided specific
6 examples of various concepts and laid out in great detail the applicability of the rule to different
7 classes of aliens,” and “also provided an exhaustive list of the additional non-cash public benefits
8 that would be considered[.]” Rule at 41321. DHS also discussed the various changes it made to
9 address the vagueness concerns, including revising the list of public benefits, simplifying the
10 public benefits threshold, and deciding not to consider the receipt of benefits not listed in the Rule.
11 *Id.* Further, DHS explained that it would provide “clear guidance to ensure that there is adequate
12 knowledge and understanding among the regulated public regarding which benefits will be
13 considered and when, as well as to ensure that aliens understand whether they are or are not subject
14 to the public charge ground of inadmissibility.” *Id.*

15 To the extent that Plaintiffs are alleging that the Rule is unconstitutionally vague under the
16 Fifth Amendment, their claim fails at the outset because the Constitution’s protections extend only
17 to the deprivation “of life, liberty, or property.” “A grant of adjustment of status is discretionary,
18 and an alien has no protected liberty or property interest in a grant of discretionary relief.”
19 *Balmaceda v. Barr*, 771 F. App’x 794, 795 (9th Cir. 2019); *see also Dhillon v. Mayorkas*, No. C-
20 10-0723 EMC, 2010 U.S. Dist. LEXIS 92921, at *13-14 (N.D. Cal. Aug. 20, 2010) (citing cases).
21 Nor is there any cognizable Fifth Amendment interest in an initial decision regarding
22 inadmissibility, because “an alien seeking initial admission to the United States requests a privilege
23 and has no constitutional rights regarding his application.” *Landon v. Plasencia*, 459 U.S. 21, 32
24 (1982).

25 Even if Plaintiffs could assert a Fifth Amendment due process claim, there is no vagueness
26 problem with the Rule. At its core, the Rule works to resolve the very concerns that motivate the
27 vagueness doctrine in the first place by supplying additional “guidelines [and] standards
28 regarding” what it means to be a public charge and how to assess the likelihood of an alien

1 becoming a public charge at any time in the future that exist only in broad strokes in the public
2 charge inadmissibility statute. *Manning v. Caldwell*, 930 F.3d 264, 274 (4th Cir. 2019). As the
3 Rule explains, the hundreds of pages of material in the NPRM “provided specific examples of
4 various concepts and laid out in great detail the applicability of the rule to different classes of
5 aliens,” and the final Rule was revised to provide a “single, objective duration-based threshold
6 applicable to the receipt of all included public benefits.” Rule at 41321. This provides far more
7 “fair notice to [aliens] about what conduct is targeted by [the] statutory [public charge]”
8 inadmissibility ground, *Manning*, 930 F.3d at 273, than the abbreviated and non-exhaustive list of
9 enumerated factors in the statute, *see* 8 U.S.C. § 1182(a)(4). The Rule cannot possibly be
10 unconstitutionally vague when it is more specific than the statute, which Plaintiffs do not
11 challenge. Finally, it is well-established—even in the criminal context—that where a significant
12 public policy interest requires a “predict[ion] of future behavior,” there is no vagueness problem
13 with a statute that grants a factfinder “wide discretion to make a predictive judgment,” such as
14 through the totality of the circumstances determination at issue here. *Nguyen v. Reynolds*, 131 F.3d
15 1340, 1353-54 (10th Cir. 1997).

16 **D. DHS Adequately Considered Potential Harms**

17 Plaintiffs next allege that the Rule is arbitrary and capricious because they claim
18 Defendants failed to adequately consider potential harms from the Rule. Am. Compl. ¶¶ 195-96.
19 But the Ninth Circuit has rejected that argument, ruling that “DHS addressed at length the costs
20 and benefits associated with the Final Rule.” *San Francisco*, 944 F.3d at 801; *see also id.* at 803
21 (discussing DHS’s analysis of costs and benefits). The Ninth Circuit noted three points. “First, the
22 costs that the states, localities, and various entities (such as healthcare providers) may suffer are
23 indirect” and the consequence of the “(1) free choice of aliens who wish to avoid any negative
24 repercussions for their immigration status that would result from accepting public benefits, or (2)
25 the mistaken disenrollment of aliens or U.S. citizens who can receive public benefits without any
26 consequences for their residency status.” *San Francisco*, 944 F.3d at 803 (explaining that “DHS
27 addressed both groups). Second, DHS acknowledged the potential indirect costs from the Rule.
28 *Id.* (citing Rule at 41486). “It did not attempt to quantify those costs, but it recognized the overall

1 effect of the Final Rule, and that is sufficient.” *Id.* And, third, DHS is not tasked with regulation
2 of public benefits; in the Rule, it was “defining a simple statutory term—‘public charge’—to
3 determine whether an alien is inadmissible.” *Id.* at 803-04. “Even if it could estimate the costs to
4 the states, localities, and healthcare providers, DHS has a mandate from Congress with respect to
5 admitting aliens to the United States.” *Id.* at 804. Accordingly, “it was sufficient—and not
6 arbitrary and capricious—for DHS to consider whether, in the long term, the overall benefits of its
7 policy change will outweigh the costs of retaining the current policy.” *Id.*

8 Relatedly, Plaintiffs fail to plausibly allege that DHS did not sufficiently respond to public
9 comments. Am. Compl. ¶ 199. An agency’s obligation to respond to comments on a proposed
10 rulemaking is “not ‘particularly demanding.’” *Ass’n of Private Sector Colls. & Univs. v. Duncan*,
11 681 F.3d 427, 441–42 (D.C. Cir. 2012). “[T]he agency’s response to public comments need only
12 ‘enable [courts] to see what major issues of policy were ventilated . . . and why the agency reacted
13 to them as it did.’” *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993). DHS plainly
14 met this standard here. As discussed above, DHS thoroughly addressed comments that the Rule
15 would cause harm from, *inter alia*, disenrollment in public benefits. And although Plaintiffs allege
16 that DHS “failed to adequately respond to comments related to the potential retroactive application
17 of the Regulation,” Am. Compl. ¶ 113, the Rule shows that DHS provided a lengthy response to
18 such comments. *See* Rule at 41320-21. In particular, DHS clearly stated that it “will not apply
19 the new expanded definition of public benefit to benefits received before the effective date of this
20 final rule.” *Id.* at 41321.

21 **E. Plaintiffs’ Additional Allegations Do Not Show Any Arbitrariness or**
22 **Capriciousness**

23 Next, Plaintiffs failed to allege facts to support their conclusion that “USCIS and DHS
24 were improperly influenced in their rulemaking process by the political motivations of individuals
25 within the Trump Administration.” Am. Compl. ¶ 200. The most that could be inferred from the
26 Amended Complaint’s allegations on this topic is that White House officials wanted to speed up
27 the release of the Rule, *id.* ¶¶ 131-32, which does not suggest any improper political influence. In
28 any event, as the Supreme Court recently explained, “a court may not set aside an agency’s

1 policymaking decision solely because it might have been influenced by political considerations or
2 prompted by an Administration’s priorities.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551,
3 2573 (2019). “Agency policymaking is not a ‘rarified technocratic process, unaffected by political
4 considerations or the presence of Presidential power.’” *Id.* (quoting *Sierra Club v. Costle*, 657 F.
5 2d 298, 408 (D.C. Cir. 1981)). On the contrary, “[s]uch decisions are routinely informed by
6 unstated considerations of politics, the legislative process, public relations, interest group relations,
7 foreign relations, and national security concerns (among others).” *Id.* Outside certain narrow
8 circumstances not applicable here (such as in on-the-record hearings), these types of
9 communications are not grounds to set aside agency action under the APA. *Sierra Club*, 657 F.2d
10 at 408-10.

11 Lastly, Plaintiffs allege that the Rule is arbitrary and capricious because it allegedly
12 discriminates against non-white immigrants. Am. Compl. ¶¶ 197-98. As discussed below, that
13 contention is unsupported and incorrect. *See* Section VII *infra*.

14 **V. McAleenan Lawfully Served as Acting Secretary**

15 In Count Three, Plaintiffs allege that former Acting Secretary McAleenan “was serving in
16 violation of DHS’s organic statute and DHS’s regulations promulgated pursuant to that statute at
17 the time of the Regulation’s issuance” and that the Rule therefore violates the APA. Am. Compl.
18 ¶ 203. Similarly, in Count Five, Plaintiffs allege that Acting Secretary McAleenan’s service
19 violated the Federal Vacancies Reform Act (“FVRA”) and the DHS organic statute. *See id.* ¶¶ 207-
20 13. And in Count Eight, Plaintiffs seek similar relief under the Declaratory Judgment Act. *See id.*
21 ¶¶ 227-30.

22 The FVRA is not the exclusive scheme for acting service if there is an express office-
23 specific statutory provision for acting service. 5 U.S.C. § 3347(a). In 2017, long after the FVRA’s
24 enactment, Congress expressly gave the DHS Secretary the authority to set the order of succession
25 to serve as Acting Secretary. The Deputy Secretary and the Under Secretary for Management, in
26 that order, shall serve as the Acting Secretary in the event of a vacancy, but “the Secretary may
27 designate such other officers of the Department in further order of succession to serve as Acting
28 Secretary.” *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114- 328,

1 § 1903, 130 Stat. 2000 (2016). This statutory authority, codified at 6 U.S.C. § 113(g)(2), exists
 2 “notwithstanding” the FVRA. Plaintiffs are incorrect that a 2016 order of succession controlled
 3 the order of succession at the time of Acting Secretary McAleenan’s appointment. Am. Compl. ¶
 4 210. As they acknowledge elsewhere in the Amended Complaint, on April 10, 2019, then-
 5 Secretary Nielsen established a new succession order that placed the CBP Commissioner third in
 6 the line of succession for Acting Secretary. *Id.* ¶ 150; *see also* Declaration of Juliana Blackwell,
 7 Ex. 1, April 10, 2019 Amendment to Order of Succession (incorporated into Amended Complaint
 8 by reference at ¶ 150). Because the offices of Deputy Secretary and Under Secretary for
 9 Management offices were vacant when Nielsen resigned, then-CBP Commissioner McAleenan
 10 became Acting Secretary. Thus, Acting Secretary McAleenan validly served under 6 U.S.C. §
 11 113(g)(2).

12 Plaintiffs allege that “Secretary Nielsen amended that Order of Succession, but only for
 13 situations where the Secretary is incapable of acting ‘during a disaster or catastrophic
 14 emergency,’” but not for cases when the Secretary resigns. Am. Compl. ¶¶ 150-51. That is refuted
 15 by the amendment itself. The amendment plainly states: “I hereby designate the *order of*
 16 *succession* for the Secretary of Homeland Security as follows” Ex. 1 at 2 (emphasis added).
 17 Accordingly, Acting Secretary McAleenan’s service was lawful.

18 **VI. Cuccinelli Lawfully Served as Acting USCIS Director**

19 Plaintiffs bring three claims challenging the service of former USCIS Acting Director
 20 Cuccinelli. *See* Am. Compl. ¶¶ 204-06 (Count Four); *id.* ¶¶ 214-18 (Count Six); *id.* ¶¶ 227-30
 21 (Count Eight). All of those claims should be dismissed because the Rule was promulgated under
 22 the authority and signature of the Acting Secretary of Homeland Security, Kevin McAleenan.
 23 Plaintiffs’ Amended Complaint alleges that at the time the Rule was promulgated, USCIS Acting
 24 Director Cuccinelli’s⁶ service violated the FVRA, and that the Rule is invalid because Mr.
 25 Cuccinelli “was involved in the Regulation’s promulgation,” *id.* ¶ 206. However, it is plain on
 26 the face of the Rule that it was promulgated under the signature and the authority of the Acting

27 _____
 28 ⁶ Mr. Cuccinelli is currently serving as the Senior Official Performing the Duties of Deputy
 Secretary of Homeland Security.

1 Secretary of Homeland Security. Rule at 41295-96; 41508. Mr. Cuccinelli lawfully served as
2 Acting Director of the USCIS, but because Cuccinelli’s service is irrelevant to the Rule’s validity,
3 the Court need not address it.

4 FVRA principles have no application to the Rule because the Rule’s passage was not an
5 “action taken by” USCIS Acting Director Cuccinelli. The FVRA permits certain “Government
6 officials to perform acting service in a vacant” office requiring Senate confirmation. *NLRB v. SW*
7 *Gen., Inc.*, 137 S. Ct. 929, 936 (2017). The FVRA provides that, in general, “[a]n action taken by
8 any person who is not” properly serving in an acting capacity under the statute “in the
9 performance of any function or duty of a vacant office . . . shall have no force or effect.” 5 U.S.C.
10 § 3348(d)(1). The FVRA defines “action” to include “the whole or a part of an agency rule.” 5
11 U.S.C. § 3348(a)(1) (defining “action” to include “any agency action as defined under section
12 551(13)”); 5 U.S.C. § 551(13). The Rule was formally promulgated by Acting Secretary
13 McAleenan pursuant to 8 U.S.C. § 1103(a), which gives the “Secretary of Homeland Security”
14 the authority to “establish such regulations” that “he deems necessary for carrying out his
15 authority under the provisions” of the INA. Rule at 41295, 41508. Thus, because Mr. Cuccinelli
16 did not take the action that Plaintiffs are challenging, his service as USCIS Acting Director has
17 no bearing here.

18 VII. The Rule Does Not Violate Equal Protection

19 In their seventh claim, Plaintiffs allege that the Rule violates the Equal Protection
20 component of the Fifth Amendment to the Constitution. Plaintiffs fail to state an equal protection
21 claim because their complaint includes no well-pled allegation that DHS issued the Rule based on
22 any improper discriminatory motive. Plaintiffs do not deny that the Rule is facially neutral, but
23 claim that the Rule violates the equal protection clause because its alleged purpose is to
24 disproportionately affect a particular racial subset of immigrants. *See* Am. Compl. ¶¶ 1220-21. In
25 support, Plaintiffs rely primarily on a handful of stray comments by certain non-DHS officials
26 concerning immigration in general, rather than the Rule in particular. Plaintiffs’ allegations are
27 insufficient to establish a plausible equal protection claim.

28

1 “[O]fficial action will not be held unconstitutional solely because it results in a racially
2 disproportionate impact.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252,
3 264-65 (1977). “Proof of racially discriminatory intent or purpose is required to show a violation
4 of the Equal Protection Clause.” *Id.* at 265. “Discriminatory purpose . . . implies more than intent
5 as volition or intent as awareness of consequences.” *Pers. Adm’r of Massachusetts v. Feeney*, 442
6 U.S. 256, 279 (1979). “It implies that the *decisionmaker* . . . selected . . . a particular course of
7 action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable
8 group.” *Id.* (emphasis added). Additionally, strict scrutiny does not apply simply because a plaintiff
9 alleges a disproportionate impact on a particular racial or ethnic group; rational basis applies unless
10 Plaintiffs establish discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 242 (1976)
11 (“Disproportionate impact . . . [s]tanding alone . . . does not trigger the rule . . . that racial
12 classifications are to be subjected to the strictest scrutiny.”).

13 A narrow standard of review here is particularly appropriate because this case implicates
14 the Executive Branch’s authority over the admission and exclusion of foreign nationals, “a matter
15 within the core of executive responsibility.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018); *id.* at
16 2419 (highly deferential standard is appropriate “[g]iven the authority of the political branches
17 over admission”). Indeed, this “deferential standard of review” applies “across different contexts
18 and constitutional claims” because “it is not the judicial role in cases of this sort to probe and test
19 the justifications of immigration policies.” *Id.* “A conventional application of” this standard,
20 “asking only whether the policy is facially legitimate and bona fide,” would plainly require
21 dismissal of Plaintiffs’ equal protection claims because Plaintiffs do not contend there is anything
22 facially discriminatory about the Rule. *Id.* at 2420. But dismissal is also appropriate if the Court
23 were to apply rational basis review to Plaintiffs’ claim. Under that standard, the Court considers
24 only whether the policy is “plausibly related to the Government’s stated objective” and must
25 “uphold the policy so long as it can reasonably be understood to result from a justification
26 independent of unconstitutional grounds.” *Id.* The Amended Complaint contains no allegations
27 suggesting that the Rule is not at least plausibly related to DHS’s stated objectives.

28

1 Under any potentially-applicable standard, however, this claim fails because Plaintiffs’
2 allegations do not suggest that DHS issued the Rule “because of” any alleged “adverse effects
3 upon an identifiable” racial or ethnic group. First, “the [stated] purposes of the” Rule “provide the
4 surest explanation for its” design and implementation. *Feeney*, 442 U.S. at 279. The Rule’s
5 preamble (spanning roughly 200 pages) thoroughly explains the Rule’s non-discriminatory
6 justifications, including the need to facilitate self-sufficiency among aliens seeking to come to or
7 remain in the United States temporarily or permanently. *See* Rule at 41295 (“DHS is revising its
8 interpretation of ‘public charge’ . . . to better ensure that aliens subject to the public charge
9 inadmissibility ground are self-sufficient.”); Rule at 41308 (“DHS believes [the] broader definition
10 [of public charge] is consistent with Congress’ intention that aliens should be self-sufficient. Self-
11 sufficiency is, and has long been, a basic principle of immigration law in this country. DHS
12 believes that this rule aligns DHS regulations with that principle.”). Additionally, the Rule’s
13 construction was guided by an extensive notice-and-comment process, following a NPRM that
14 was just under 200 pages long. *See* NPRM. The Rule included a number of changes from the
15 proposed rule in response to public comments. *See, e.g.*, Rule at 41297. The Rule’s procedural
16 history undermines Plaintiffs’ conclusory assertion that the Rule’s design may somehow be
17 attributed to any alleged improper bias.

18 Second, to show that DHS issued the rule due to improper motives, Plaintiffs rely almost
19 exclusively on alleged public statements by non-DHS officials. The alleged public statements in
20 the Amended Complaint reflect general views on immigration, and say nothing of why any
21 particular official supported the Rule. *See, e.g.*, Am. Compl. ¶ 126. And the allegations that do
22 relate to the Rule say nothing of why particular officials supported, or pushed for, the Rule. *See,*
23 *e.g.*, Am. Compl. ¶¶ 131-34. Regardless, “contemporary statements” may be relevant to the
24 question of whether an “invidious discriminatory purpose was a motivating factor,” if made “by
25 members of the decisionmaking body.” *Arlington Heights*, 429 U.S. at 268; *see also Clearwater*
26 *v. Indep. Sch. Dist. No. 166*, 231 F.3d 1122, 1126 (8th Cir. 2000) (“Evidence demonstrating
27 discriminatory animus in the decisional process needs to be distinguished from stray remarks . . .
28 statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional

1 process.”). Here, Plaintiffs rely almost exclusively on statements made by non-DHS personnel,
2 and Plaintiffs provide no explanation for how these statements reveal that *DHS* harbored an
3 improper motive in implementing the Rule. Accordingly, Plaintiffs have failed to state a plausible
4 equal protection claim.

5 **VIII. The President Is Not a Proper Defendant**

6 Even if the Court allows one or more claims to proceed, the Court should dismiss the
7 President as a Defendant because Plaintiffs lack an express or implied equitable cause of action to
8 sue the President. Although courts of equity may in some circumstances permit suits to “enjoin
9 unconstitutional actions by . . . federal officers,” *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.
10 Ct. 1378, 1384 (2015), the availability of such relief depends on whether it “was traditionally
11 accorded by courts of equity,” *Grupo Mexicano De Desarrollo v. All. Bond Fund*, 527 U.S. 308,
12 319 (1999).

13 There is no tradition of equitable relief against the President. As the Supreme Court first
14 recognized over 150 years ago, federal courts have “no jurisdiction of a bill to enjoin the President
15 in the performance of his official duties.” *Mississippi v. Johnson*, 71 U.S. (4 Wall) 475, 501 (1866).
16 More recently, the Court reaffirmed that separation of powers principle and explained that a grant
17 of injunctive relief against a president was an “extraordinary” act that “should have raised judicial
18 eyebrows.” *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (plurality opinion); *id.* at 827
19 (Scalia, J., concurring in part and concurring in the judgment) (“apparently unbroken historical
20 tradition supports the view” that courts may not order the President to “perform particular
21 executive . . . acts”); *see also Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017), vacated as
22 moot, 138 S. Ct. 377 (2017) (“[T]he extraordinary remedy of enjoining the President is not
23 appropriate here.”).

24 Moreover, the Supreme Court has twice held that causes of action that are available against
25 other government officials should not be extended to the President absent a clear statement by
26 Congress. *See Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982); *Franklin*, 505 U.S. 788, 801
27 (declining to find cause of action against the President under the Administrative Procedure Act
28

1 “[o]ut of respect for the separation of powers and the unique constitutional position of the
2 President”). Accordingly, the claims against the President should be dismissed.

3 **CONCLUSION**

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

5
6 Dated: June 10, 2020

Respectfully submitted,

7
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