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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

LA CLÍNICA DE LA RAZA, ET AL., Plaintiffs, v. DONALD J. TRUMP, ET AL. Defendants.	Case No. 4:19-cv-04980-PJH **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS; EXHIBITS A AND B** Date: July 29, 2020 Time: 9:00 AM Courtroom: 3 Judge: Hon. Phyllis J. Hamilton Trial Date: None Set Action Filed: August 16, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

FEDERAL STATUTES

FEDERAL REGULATIONS

TABLE OF AUTHORITIES
(Continued)

Page

LAW REVIEW

I. INTRODUCTION

As part of the Trump Administration's broader effort to curtail non-white immigration, Defendants promulgated the Public Charge Rule, *Inadmissibility on Public Charge Grounds* ("Rule"), 84 Fed. Reg. 41,292 (Aug. 14, 2019). The Rule fails to comport with the Constitution and statutory law. Specifically, the Rule does not comply with the core requirements of the Administrative Procedure Act ("APA"), was issued by improperly appointed officials, and was motivated by racial animus. Plaintiffs La Clínica de La Raza, African Communities Together, California Primary Care Association, Central American Resource Center, Farmworker Justice, Council on American-Islamic Relations-California, Korean Resource Center, Maternal and Child Health Access, and Legal Aid Society of San Mateo County have plausibly stated in their First Amended Complaint that these are claims on which relief can be granted.

Plaintiffs have adequately pleaded that they have standing and are within the zone of interests. This Court already found that Plaintiffs demonstrated sufficient evidence of standing at the preliminary injunction stage because the Rule frustrates Plaintiffs' missions to provide immigration relief and access to critical health, nutrition, and housing programs, and is causing Plaintiffs to lose funding from Medicaid disenrollment and falling caseloads, as well as diverting their resources; nothing has occurred in the intervening time to change this analysis. *See* ECF No. 131, Prelim. Inj. Order at 83-85 (Oct. 11, 2019) [hereinafter "PI"]. And although this Court previously found, based on Plaintiffs' preliminary injunction arguments, that Plaintiffs were outside the public charge provision's zone of interests, for the reasons discussed below, Plaintiffs have sufficiently pleaded in their First Amended Complaint that they are within the zone of interests of the public charge provision. Moreover, Plaintiffs have advanced several claims to which Defendants' zone of interests challenge does not apply.

With regard to Plaintiffs' APA claims, as this Court previously noted, the Rule drastically departs from over a century's interpretation of the term "public charge," and arbitrarily introduces new factors for the public charge test that are contrary to the statute. PI at 47-48. As an independent ground for invalidity, the Rule is arbitrary and capricious in violation of the APA because defendants failed to adequately consider the significant costs of the Rule. PI at 53-62.

While a motions panel in *City and County of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019), expressed disagreement with these conclusions, that decision is not binding on this Court and applied a higher burden than is applicable here, and the Ninth Circuit has yet to issue a decision on the merits of the Preliminary Injunction issued by this Court. At this stage of the litigation, Plaintiffs have sufficiently alleged facts to proceed with their APA claims.

This Court has not yet needed to address Plaintiffs' remaining claims. Plaintiffs have sufficiently alleged that the Rule was developed and promulgated by administration officials who were appointed unlawfully in violation of the Department of Homeland Security's Organic Statute and the Federal Vacancies Reform Act ("FVRA"), which separately violates both the FVRA and APA. Similarly, they have sufficiently pleaded that the Rule was motivated by animus against non-white immigrants in violation of the Constitution's guarantee of Equal Protection, including direct and circumstantial evidence of discriminatory intent, the Rule's discriminatory impact, and procedural irregularities.

For these reasons set forth in greater detail below, this Court should deny Defendants' Motion to Dismiss in its entirety.

II. STATEMENT OF THE CASE

The Court is likely familiar with the facts surrounding the promulgation of the Rule, which are discussed at greater length in Plaintiffs' Motion for a Preliminary Injunction, ECF No. 35, at 2-7 [hereinafter "Pls.' Mot. for PI"]. Plaintiffs filed their initial complaint challenging the Rule on four distinct grounds on August 16, 2019. ECF No. 1. On August 30, 2019, the Court ordered this action related to the action brought by the County and City Plaintiffs, No. 19-cv-04717, to which the State Plaintiffs' case, No. 19-cv-04975, is also related. *See* ECF No. 31. Plaintiffs filed their Motion for a Preliminary Injunction on September 4, 2019. ECF No. 35. On October 11, 2019, this Court issued an order granting a preliminary injunction against the Rule, though it found that the organizational Plaintiffs were not within the zone of interests of the INA. *See generally* PI. Defendants appealed this Court's preliminary injunction, and on December 5, 2019, the Ninth Circuit stayed the preliminary injunction pending a review of the merits of the injunction. *City & Cty. of S.F. v. USCIS*, 944 F.3d 773 (9th Cir. 2019) [hereinafter "Stay Order"].

The merits phase of that appeal remains pending before the Ninth Circuit. On April 1, 2020, this Court granted in part Plaintiffs' motion to complete the administrative record and compel discovery, but stayed discovery pending resolution of this motion. ECF No. 157. Plaintiffs filed their First Amended Complaint (hereinafter "FAC") on May 20, 2020. ECF No. 161. On June 10, 2020, Defendants filed their Motion to Dismiss (Defs.' Mot.), to which this Opposition responds. ECF No. 166.

III. STANDARD OF REVIEW

To survive a 12(b)(6) motion to dismiss, a complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted). A claim meets this plausibility requirement so long as "the plaintiff pleads factual content that allows a court to draw the reasonable inference that the defendant is liable . . . ." *Id.* When ruling on the motion, the reviewing court must "accept all factual allegations as true and construe them in the light most favorable to the plaintiff." *Soman v. Alameda Health Sys.*, No. 17-CV-06076-JD, 2018 WL 6308185, at *2 (N.D. Cal. Dec. 3, 2018); *see also JMP Sec. LLP v. Altair Nanotechnologies Inc.*, 880 F. Supp. 2d 1029, 1038 (N.D. Cal. 2012) (drawing reasonable inference that defendant was liable).

IV. ARGUMENT

A. Plaintiffs Have Sufficiently Pleaded Standing and Ripeness

Defendants principally reprise their argument from the preliminary injunction phase, claiming that Plaintiffs have alleged only "abstract social interest" harms. Defs.' Mot. at 6. This Court previously rejected that contention, holding that Plaintiffs have sufficiently alleged injury by showing that the "policy frustrates the organization's goals and requires the organization to expend resources in representing clients they otherwise would spend in other ways." PI at 83 (quoting *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765 (9th Cir. 2018) [hereinafter *E. Bay Sanctuary I*]).

For the reasons explained by the Court, Plaintiffs have adequately pleaded that they have experienced these harms. Plaintiffs "have adequately alleged frustration of their purpose because many of their clients . . . will choose to not enroll or to disenroll from benefits," or forego access

to medical care. PI at 85; FAC ¶¶ 17, 21, 24, 27, 30, 35, 37. Plaintiffs have sufficiently pleaded that they have diverted and will divert resources to counteract the effects of the Rule, including the additional time and resources spent on patient and client consultations, increased operational costs, and diversion of resources from other core services and priorities to combat the effects of Defendants' Rule. PI at 85; FAC ¶¶ 25, 28, 31, 33, 35, 38, 40, 44-45. Plaintiffs also face direct financial consequences from the Rule, as decreases in the use of benefits and Plaintiffs' services will reduce funding streams connected to provision of services, and the health care providers face increases in uncompensated care. Pls.' Mot. for PI at 28-30; FAC ¶¶ 17, 21, 25, 33, 38, 40. Now that the Rule's implementation is discouraging clients from seeking benefits and obtaining immigration relief, the imminent and actual harms raised in the preliminary injunction are occurring and intensifying. FAC ¶¶ 27, 33, 35, 40, 45.

In addition, Plaintiff CPCA has sufficiently pleaded associational standing. An association may sue on behalf of its members where "at least one of its members [has] standing," the interests of the case are germane to the association's purpose, and member participation is not required. *Fleck & Assoc., Inc. v. City of Phoenix*, 471 F.3d 1100, 1105-06 (9th Cir. 2006). CPCA is a membership organization that has brought this suit to represent the interests of its members, including Asian Health Services ("AHS") and Plaintiff La Clínica, both of which satisfy the requirements for organizational standing because the Rule frustrates their mission and diverts their resources. This suit is germane to CPCA's purpose, as both the suit and the association seek to promote the interests of CPCA's health care provider members in providing health care to the low-income, immigrant communities affected by the Rule. FAC ¶¶ 15-25. While La Clínica is participating in the suit, the claims and relief sought do not require CPCA's members to participate, as the suit seeks to enjoin Defendants from enforcing their Rule.

Plaintiffs also have demonstrated that their suit is ripe. With regard to constitutional ripeness, they are being injured by Defendants' Rule, and their injuries are "definite and concrete, not hypothetical or abstract." *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1153 (9th Cir. 2017); *see also* PI at 76. Plaintiffs' claims are also prudentially ripe as the Rule is final, Plaintiffs allege that they are suffering injuries, and there is no "further factual development" that would

significantly alter the legal issues presented. PI at 77 (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003)). Indeed, now that the Rule is being implemented, Plaintiffs are continuing to divert resources, and the Rule has led to significant decreases in enrollment for public benefits and submission of adjustment of status applications. FAC ¶¶ 27, 31, 35, 40, 45. Contrary to Defendants' claims of speculation, Defs.' Mot. at 7, Plaintiffs have alleged actual harms, including the Medicaid disenrollment that Defendants' regulatory analysis predicted would occur. 84 Fed. Reg. 41,300-01; FAC ¶¶ 17, 21, 25.[1]

B. Plaintiffs Have Sufficiently Pleaded that They Are in the Zone of Interests

Defendants contend only that some of Plaintiffs' APA claims are not within the zone of interests protected by the public charge provision, 8 U.S.C. § 1182. Defs.' Mot. at 8. They therefore waive any argument that Plaintiffs are beyond the zone of interests for Plaintiffs' vacancy and Equal Protection claims, for which the Section 1182 zone of interests is irrelevant. With respect to these waived claims, "the particular provision[s] of law upon which the plaintiff[s] rel[y]," *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997), are the FVRA and DHS Organic Statute and the Equal Protection guarantees of the Fifth Amendment respectively. Defendants do not advance any vacancy-directed zone of interests argument and thus waive those arguments. *See Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1087 n.6 (9th Cir. 2003) ("[B]ecause the zone of interests test is merely prudential rather than constitutional it is waivable, and defendants have waived it by not raising it . . . ."). Likewise, Defendants waive any Equal Protection zone of interests argument by relegating it to a single footnote and citing a case that did not involve a constitutional claim. *See Estate of Saunders v. Comm'r of Internal Revenue*, 745 F.3d 953, 962 n.8 (9th Cir. 2014) ("Arguments raised only in footnotes . . . are generally deemed waived.").

Even absent waiver, Defendants would not prevail on those claims. For both types of claims, the Ninth Circuit has expressed doubt that the zone of interests test applies. *See Sierra Club v. Trump*, 929 F.3d 670, 700-01 (9th Cir. 2019) (noting Circuit is "skeptical that there could

[1] This Court already rejected Defendants' argument that Plaintiffs' harms are "side effects of third party individuals' decisions," Defs.' Mot. at 8, in the context of the losses of Medicaid funding of the State and County plaintiffs, and it should do the same here. *See* PI at 80.

be a zone of interests requirement for a claim alleging that official action was taken in the absence of all authority"); *id.* (expressing serious doubt "that any zone of interests test applies to [an] equitable cause of action to enjoin a violation of the [Constitution]" in light of *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)).

As to the remaining claims, Defendants largely rely on this Court's ruling on Plaintiffs' preliminary injunction motion, in which the Court indicated that Plaintiffs at that "stage of litigation" "ha[d] not met their burden" to show they were within the zone of interests of Section 1182. PI at 72 (noting Plaintiffs' compressed briefing in their reply memorandum "fail[ed] to explain" their arguments); *but see Make the Road N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647, 659 (S.D.N.Y. 2019) (holding organizational plaintiffs like Plaintiffs here are within the zone of interests of the public charge statute). Plaintiffs now provide a more fulsome explanation of why they satisfy the lenient zone of interests standard.

A plaintiff suing under the APA need only assert an interest "arguably within the zone of interests to be protected or regulated by the [relevant] statute." *Match-E-Be-Nash-She-Wish Band v. Patchak*, 567 U.S. 209, 224 (2012) (internal quotation marks omitted). The zone of interests test "is not meant to be especially demanding." *Id.* at 225 (internal quotation marks omitted). No "'indication of congressional purpose to benefit the would-be plaintiffs'" is required. *Id.* (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987)). The test forecloses suit *only if* the plaintiff's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399. This is a "lenient approach" that "preserv[es] the flexibility of the APA's omnibus judicial-review provision." *Lexmark Int'l*, 572 U.S. at 130.[2]

[2] Defendants' argument that *only* a person "improperly determined to be inadmissible" is within the zone of interests (Defs.' Mot. at 8–9) is contrary to *Clarke*. *Clarke* sets out a framework especially for "cases where the plaintiff is not itself the subject of the contested regulatory action." 479 U.S. at 399.

For the reasons below, Plaintiffs have plausibly alleged that their interests are at least "marginally related to" the purpose of the public charge statute, and thus satisfy the *Clarke* standard.[3]

First, one set of interests implicated by the statute is to accurately identify which immigrants are likely to become a public charge and to deny admission to those immigrants. There is no question that individuals who will be subject to a public charge determination fall within the zone of interests, and several Plaintiffs represent individuals who fit that description. *See, e.g.*, FAC ¶¶ 33 (CAIR); 34-35 (ACT); 37 (LEGAL AID); 39-40 (CARECEN); 42-43 (KRC). Plaintiffs' asserted interest in assisting immigrants with their adjustment of status applications and counseling them in the event they are subject to the public charge determination is consistent with and closely related to those of their clients and/or members. *Cook Cty., Ill. v. McAleenan*, 417 F. Supp. 3d 1008, 1020-21 (N.D. Ill. 2019) [hereinafter *Cook Cty. I*] (holding organizational plaintiff's "interests in ensuring that health and social services remain available to immigrants and in helping them navigate the immigration process are consistent with the statutory purpose … to 'ensure[ ] that only certain aliens could be determined inadmissible on the public charge ground'" were within zone of interests of public charge statute).

Courts have found that Congress recognized these inextricably intertwined interests between immigration legal service providers and their clients, giving organizations like Plaintiffs "a role in helping immigrants navigate the immigration process." *E. Bay Sanctuary I*, 932 F.3d at 769-70; *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1302 (S.D. Cal. 2018) (holding organization within zone of interests where its mission "related to the basic purposes of the INA's goal of permitting aliens to apply for asylum in the United States at" ports of entry); *see also, e.g.*, 8 U.S.C. § 1101(i)(1) (requiring that potential T visa applicants be referred to nongovernmental

[3] The Seventh Circuit in *Cook County, Ill. v. Wolf* noted the uncontroversial fact that an organizational plaintiff challenging the public charge Rule was "more attenuated" than a government plaintiff. –F.3d–, No. 19-3169, 2020 WL 3072046, at *6 (7th Cir. June 10, 2020) [hereinafter *Cook Cty. II*] (affirming preliminary injunction). In doing so, the Seventh Circuit noted only that the attenuation made it "harder" to evaluate, and chose to "not [to] resolve" the dispute "[g]iven Cook County's presence in the case." *Id.*

organizations for legal advice); § 1184(p)(3)(A) (same for U visas). Some of the provisions discussed in these prior cases are closely intertwined and have an "integral relationship" with the public charge provision, *Air Courier Conference v. American Postal Workers Union AFL-CIO*, 498 U.S. 517, 530 (1991), as many immigrants seeking to apply for a visa or adjustment of status may be subject to the public charge provision depending on which pathway they pursue; for instance, the statute generally excludes individuals applying for or granted T and U nonimmigrant status from the public charge provision. *See* 8 U.S.C. § 1182(a)(4)(E); 84 Fed. Reg. 41,335-36. Likewise, Congress specifically ensures that legal providers may be required to interpret and apply the admissibility provisions, including public charge. *Accord* 8 U.S.C. § 1362 (providing "the privilege of being represented" by counsel "[i]n any removal proceedings," including those based on inadmissibility). One of Plaintiffs' responsibilities is to advise their clients/members about the various immigration pathways that are available to them, and how to overcome any public charge barriers. FAC ¶¶ 32-43. That is enough to bring Plaintiffs within the zone of interests protected by the statute. *See E. Bay Sanctuary I*, 932 F.3d at 769.

Subsequent decisions in public charge challenges confirm this approach. *See, e.g., Make the Road N.Y.*, 419 F. Supp. 3d at 659 (holding plaintiffs that provide legal and other services to immigrants met the zone of interests test in challenge to public charge regulation because "[t]he interests of immigrants and immigrant advocacy organizations such as Plaintiffs are inextricably intertwined"); *Cook Cty. I*, 417 F. Supp. 3d at 1020-21 (holding organizational plaintiff within zone of interests to challenge public charge regulation based on "interests in ensuring that health and social services remain available to immigrants and in helping them navigate the immigration process are consistent with the statutory purpose … to 'ensure[ ] that only certain aliens could be determined inadmissible on the public charge ground'"). And in other contexts as well, service-providing plaintiffs that can "in practice can be expected to police the interests that the [relevant] statute protects" fall within that statute's zone of interests. *Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004); *see also Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 131 (2d Cir. 2020) (holding that nonprofit legal organization is within the zone of interests for statutes concerning clients' access to counsel); *ALPA Int'l v. Trans States Airlines*, LLC, 638 F.3d

572, 577-78 (8th Cir. 2011); *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 445 (D.C. Cir. 1998) (holding that individual anticipated to engage in "continued monitoring . . .to ensure that the purposes of the Act were honored" was within the statute's zone of interests); *V. Real Estate Group v. USCIS*, 85 F. Supp. 3d 1200, 1210 (D. Nev. 2015) (holding company formed to attract foreign investment from Chinese nationals seeking to immigrate could sue to overturn the revocation of an EB-5 foreign investor's visa because the company's "interest . . . is more than just marginally related to the statute's purpose since the company was actually founded with the intent that its model would satisfy the requirements of the EB-5 program and bring Chinese investors to the country").

Second, another set of "interests to be regulated [by the public charge provision] are the health and economic status of immigrants who are granted admission to the U.S." *Casa de Md., Inc. v. Trump*, 414 F. Supp. 3d 760, 775 (D. Md. 2019). Plaintiffs' missions are, in whole or in part, to protect and improve the health and economic status of immigrant communities, including by ensuring that immigrants gain access to benefits that will promote their health and economic status. *E.g.*, FAC ¶¶ 15-17 (La Clínica's mission to provide health care services to individuals who receive Medicaid benefits and who may be subject to the public charge determination); *see also id.* ¶¶ 20-21, 23-24, 26-28, 30, 33, 34-37 (describing additional Plaintiffs' missions). By facilitating access to health and economic-improving assistance that helps immigrants avoid becoming public charges, including for some in the time between entry and adjustment of status, Plaintiffs' interests, like those of their clients/patients, "are squarely within the bounds" of those protected by the statute. *Casa de Md.*, 414 F. Supp. 3d at 776; *see also E. Bay Sanctuary I*, 932 F.3d at 768 (finding that while organizations that assist asylum seekers are neither directly regulated nor benefited by the statute, "their interest in 'provid[ing] the [asylum] services [they were] formed to provide' falls within the zone of interests").

Third, Defendants' own regulation presupposes Plaintiff organizations' impact and involvement. While a court may not rely upon a regulation to "expand the zone of interests beyond what Congress intended," the Ninth Circuit has left open whether a court can "rely[] on regulations to define the zone of interests . . . ." *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d

934, 943 n.4 (9th Cir. 2005). In the months since the Preliminary Injunction, the Second Circuit has explained that courts should rely on regulations to define the zone of interests because "agency interpretations of their enabling statutes are 'among the traditional tools of statutory interpretation' that the Supreme Court has instructed us to use when defining the zone of interests protected by a given statute." *Federal Defs. of N.Y.*, 954 F.3d at 130. The court likewise noted that the Supreme Court has itself utilized "agency rules for guidance on whether a plaintiff's APA claim fell within the zone of interests." *Id.* (citing *Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 226). In this case, Defendants' Rule expressly presupposes involvement by organizations like Plaintiffs. *See* 84 Fed. Reg. at 41,301 ("[I]mmigration lawyers, immigration advocacy groups, health care providers of all types, non-profit organizations, [and] non-governmental organizations . . . among others, may need or want to become familiar with the provisions of this final rule . . . to provide information to those foreign-born non-citizens that might be affected by a reduction in federal and state transfer payments.").

In sum, Plaintiffs' interests are related to and consistent with those of the statute at issue in this case.[4] At a minimum, Plaintiffs' interests are *arguably* related, and therefore meet the "not . . . especially demanding" zone of interests test. *Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 225 (internal quotation marks and citation omitted); *see also id.* ("[T]he benefit of any doubt goes to the plaintiff.").

C. Plaintiffs Have Sufficiently Pleaded that the Rule Is Contrary to the INA

Plaintiffs have adequately pleaded in Claim One that the Rule violates the APA because it is contrary to 8 U.S.C. § 1182. On a motion to dismiss, Plaintiffs need only "give the defendant

[4] *INS v. Legalization Assistance Project*, 510 U.S. 1301 (1993) (O'Connor, J., in chambers), does not command a different result. *See* Defs.' Mot. at 9. First, a chambers decision on behalf of one Justice has limited precedential value. *See, e.g.*, *Al Otro Lado*, 327 F. Supp. 3d at 1300; *Cook Cty. I*, 417 F. Supp. 3d at 1021. Moreover, the case is inapposite because it did not involve the INA or APA, and it "predates the [Supreme] Court's articulation . . . of the current, more flexible understanding of the zone of interests test in APA cases." *Cook Cty. I*, 417 F. Supp. 3d at 1021. Under that flexible standard, courts have recognized that "the zone of interests need not be drawn so narrowly as to encompass only [individuals] that have received an adverse determination under the [public charge] statute." *Casa de Md.*, 414 F. Supp. 3d at 777.

fair notice" of the claim to sufficiently plead "a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) (internal quotation marks and citation omitted). Plaintiffs' 230-paragraph FAC gives more than fair notice.

This Court already has held that Plaintiffs are likely to show that the Rule is contrary to the longstanding definition of "public charge" in Section 1182. Defendants principally contend that this count should be dismissed because a divided Ninth Circuit motions panel stayed this Court's preliminary injunction pending appeal, finding that the government Plaintiffs were unlikely to succeed on the merits of this claim. But the Stay Order does not bind the merits panel that will review this Court's preliminary injunction, is not "law of the case," and is not controlling on this Court. *See, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1262-65 (9th Cir. 2020) [hereinafter *E. Bay Sanctuary II*]; *Homans v. City of Albuquerque*, 366 F.3d 900, 905 (10th Cir. 2004) (district court was not bound by preliminary injunction decision of appellate motions panel). Indeed, the only appellate merits panel to issue a decision on the preliminary injunction's merits agreed with this Court's holding that the definition is unlawful. *Cook Cty. II*, 2020 WL 3072046, at *11-13 (holding that plaintiffs were likely to succeed on their claim that the Rule was not a permissible construction of the statute at *Chevron* step two). Until the Ninth Circuit merits panel has had an opportunity to rule, this Court should not dismiss Plaintiffs' claim that the Rule is contrary to the APA.

Plaintiffs' detailed FAC sets forth a plausible and cognizable legal theory that DHS' interpretation of the term "public charge" is "contrary to the plain and well-established meaning of that phrase, and to how it has been interpreted and applied since 1882." FAC ¶ 186. This Court previously found that plaintiffs are likely to succeed on the merits of this claim, and had at least raised serious questions as to whether "the statute, read in context, unambiguously forecloses . . . DHS's expansive interpretation of the term [public charge]." PI at 48.

Even assuming that the term "public charge" does not have a fixed meaning, the motions panel itself conceded that at no time in the nearly 140-year use of the term public charge in immigration statutes has it been defined to permit a finding of inadmissibility based on receiving temporary, supplemental assistance, as Defendants have in the Rule. Stay Order, 944 F.3d at 792-

98. When this history is properly considered under *Chevron* step two, the Rule's new and unprecedented interpretation of "public charge" is "substantially outside the bounds of a reasonable interpretation." PI at 48-49; *see Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 471 (2001) (a particular construction can be "unambiguously bar[red]" when "interpreted in its statutory and historical context").

Indeed, in light of this history and the detailed analysis in this Court's opinion, the motions panel failed in at least three key ways to explain how Defendants' definition could be a reasonable interpretation of the public charge statute. First, it did not explain how immigrants who receive a limited number of supplemental, temporary public benefits for several months in any three-year period fit within any definition of the public charge test employed in the 140-year history of the term. *See* PI at 16-46. Second, it offered no explanation for the Rule's consideration of negligible amounts of supplemental, non-cash benefits, even though it would result in individuals being deemed a public charge based on "an average of less than 17 cents a day" of nutritional assistance over three years. PI at 44, 46-47. Third, it failed to grapple with the fact that nearly one-half of U.S.-born citizens would meet the definition of "public charge" provided by the Rule, which "suggests that the Rule is substantially outside the bounds of a reasonable interpretation of the statute." PI at 48.

Defendants raise two additional arguments not adopted by the Stay Order, but neither warrants dismissal of Plaintiffs' claim. First, Defendants note that certain statutes instruct the agency not to consider "any benefits" received by an immigrant who has been "battered or subjected to extreme cruelty" when making a public charge assessment. 8 U.S.C. § 1641(c); § 1182(s). DHS contends that this provision "presupposes that DHS would, ordinarily, consider the past receipt of benefits in making public-charge inadmissibility determinations." Defs. Mot. at 10. But the battered immigrant provision refers broadly to "benefits" and does not single out particular supplemental benefits. As a result, it does not suggest that Congress intended for DHS to consider temporary, supplemental benefits when making the "public charge" determination, as the Rule now requires. Indeed, Congress later clarified that certain vulnerable immigrants who are

survivors of domestic violence are not subject to the public charge inadmissibility ground at all, regardless of which benefits are relevant in that determination.[5] *See* 8 U.S.C. § 1182(a)(4)(E).

Second, Defendants contend that the INA's requirement of an affidavit of support shows that Congress wanted non-cash, supplemental benefits to be a part of the public charge assessment, because those affidavits require sponsors to reimburse governments for "any means-tested public benefit." Defs.' Mot. at 11 (quoting 8 U.S.C. § 1183a(b)(1)(A)). In fact, the affidavit of support provision, which applies to only some immigrants, only reinforces that Congress expected immigrants to obtain means-tested public benefits after admission, as it creates a method by which the government can recoup the value of such benefits from their sponsors. Affidavits of support help ensure that sponsors make good on their promise to support their family members, but they are not, as the government now claims, some sort of backdoor method by which Congress intended to *sub silentio* alter the definition of public charge. *Am. Trucking Ass'ns*, 531 U.S. at 468 (Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

D. Plaintiffs Have Sufficiently Pleaded Their Claims that the Rule Is Arbitrary and Capricious under the APA

Just as with Count One, this Court already has held that Plaintiffs have not only plausibly stated Claims Two, Three, and Four on the pleadings, but also were likely to succeed on the merits. PI at 53 ("[T]his court finds that they are likely to succeed on the merits with respect to their claim that the Rule is arbitrary and capricious."). Defendants seek to sidestep this Court's holding by pointing to the Ninth Circuit's Stay Order. *See* Defs.' Mot. at 12, 15-16. But, as explained above, the Stay Order is not controlling. Likewise, even the merits panel would only bind this court to the extent those questions were "pure questions of law." *See Ranchers Cattleman Action Legal Fund v. U.S. Dep't of Labor*, 499 F.3d 1108, 1114 (9th Cir. 2007) (noting

[5] Timing especially belies Defendants' argument as to Section 1182(s). Congress enacted that provision *while the 1999 Field Guidance was in effect*, and thus did so while DHS was expressly *not* taking supplemental benefits into account. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386 § 1505(f), 114 Stat. 1526 (Oct. 28, 2000).

that preliminary injunctions are not generally the law of the case, except as to "conclusions on pure issue of law.") This Court should deny Defendants' motion to dismiss Plaintiffs' claims that the Rule is arbitrary and capricious.

As this Court already held, "DHS failed to adequately consider significant costs to local and state governments raised in comments, as well as the related issue of DHS's failure to consider evidence when estimating disenrollment figures" and "failed to consider concerns about health effects like disease outbreaks." PI at 53. This prior decision is buttressed by the Seventh Circuit's recent merits decision affirming a preliminary injunction against the Rule, holding that it is arbitrary and capricious for reasons raised by Plaintiffs and previously held by this Court. *See Cook Cty. II*, 2020 WL 3072046, at *14-16. Echoing this Court, the Seventh Circuit held that the Rule "is likely to fail the 'arbitrary and capricious' standard" because it "has numerous unexplained serious flaws: DHS did not adequately consider the reliance interests of state and local governments; did not acknowledge or address the significant, predictable collateral consequences of the Rule; incorporated into the term 'public charge' an understanding of self-sufficiency that has no basis in the statute it supposedly interprets; and failed to address critical issues such as the relevance of the five-year waiting period for immigrant eligibility for most federal benefits." *Id.* at *16. Plaintiffs have plausibly alleged all of the underlying facts that informed this Court and the Seventh Circuit's decisions, such as the failure to grapple with numerous comments providing hard evidence of disenrollment figures and collateral consequences caused by the chilling effects of this Rule—the exact issues that shaped the agency's prior policy on public charge in its 1999 Field Guidance. FAC ¶¶ 11, 75-89, 162-82, 190-96. These allegations are sufficient at this stage and the Court should not dismiss these record-based APA claims without review of the full administrative record. *See Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 721 (9th Cir. 2011) (plaintiff bringing an APA claim "is not required to 'demonstrate' anything in order to survive a Rule 12(b)(6) motion to dismiss. Rather, it only needs to *allege* sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.") (internal quote and citations omitted); *cf. Anderson v. McCarthy*, No. C 16-00068 WHA, 2016 WL 2770544, at *3 (N.D. Cal. May 13, 2016) (rejecting rule 12(b)(1) motion to

dismiss because matter is better decided at summary judgment after reviewing the full administrative record).

Not only does Defendants' reliance on the Stay Order fail for the reasons described above, but since the Stay Order was issued, the Supreme Court has reemphasized that "when an agency rescinds a prior policy" on which there was legitimate reliance, it is not sufficient to merely acknowledge costs and decide they are outweighed without providing a reasoned explanation. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, -S. Ct.-, No. 18-587, 2020 WL 3271746, at *14 (June 18, 2020); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (requiring "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy"). The Stay Order accepted Defendants' claim that they did not have data to address these costs and chilling issues, 944 F.3d at 803, even though, as this Court pointed out, there were "estimates and credible data explained in the comments" submitted to the agency, PI at 53-55 (noting "specific cost calculations"). Defendants' decision to avoid this substantial, contrary evidence without explanation was arbitrary and capricious.[6] *See Genuine Parts Co. v. EPA*, 890 F.3d 304, 311-12 (D.C. Cir. 2018) (explaining that an agency "must examine the relevant data" and "[c]onclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice").

Notably, Defendants do not defend the Stay Order's analysis of the Rule's negative public health effects, which was limited to vaccinations, *see* 944 F.3d at 804-05. As the FAC alleges and this Court previously recognized, the issue is not only about vaccines but instead about "general public health (not simple health of the aliens—e.g., vaccines)" that is threatened by the Rule's disincentivizing use of public benefits. PI at 62; *see also* FAC ¶¶ 11-13, 76, 162-168, 195. During the current COVID-19 global pandemic, the importance of general public health has been put into even sharper relief. FAC ¶¶ 12-13. The Rule is arbitrary and capricious because "DHS

[6] DHS also provided its own estimates for the chilling effect in its Final Regulatory Impact Analysis. ECF No. 117-1, Kolsky Decl., Ex. A, Regulatory Impact Analysis at 89–101 & Table 20 (calculating potential benefit disenrollment at three different levels). DHS cannot reasonably claim both that it is too difficult to estimate a chilling effect and simultaneously conduct a cost-benefit analysis that estimates a chilling effect.

simply declined to engage with certain, identified public-health consequences of the Rule" and "fail[ed] entirely to provide a reasoned explanation for disregarding the facts and circumstances underlying" the 1999 Field Guidance. PI at 62-63. Defendants' and the Stay Order's myopic focus on vaccines missed the larger general public health issue recognized by this Court and set forth in numerous public comments.

In addition, the FAC identifies several other plausible and legally cognizable bases for finding the Rule arbitrary and capricious. For instance, without sufficient justification, Defendants expanded application of the public charge test to an entirely new group that is not contemplated by the statute: nonimmigrants seeking a change of status or an extension of their stay. FAC ¶¶ 7, 108. Defendants do not explain how the interpretation of "public charge" in Section 1182 could somehow capture an entire group of persons not covered by that statute; the Rule merely states that DHS has authority under *other* statutes to regulate nonimmigrants and conditions for change of status. 84 Fed. Reg. 41,329. But the existence of other statutes is not a reasoned basis for interpreting what "public charge" means in *this* statute. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124-25 (2016) (agency role is to provide "adequate reasons" for interpretation of statute).

The Rule also considers factors not reasonably related to public charge determinations, like credit score and English proficiency, and skews the purported totality of circumstances test to negative factors. FAC ¶¶ 6, 109, 118-21, 193. As the Seventh Circuit held, these new factors go beyond "the objective facts called for by the Act," and the Rule lacks guidance for making "predictions in a nonarbitrary way" when determining whether an individual is likely to become a "public charge" at any time in the future. *Cook Cty. II*, 2020 WL 3072046, at *16. This is particularly troubling because many of these factors, including credit scores and English proficiency, change over time, and an immigration officer conducting a public charge determination "will be speculating" about the applicant's credit and English proficiency "no fewer than five years in the future." *Id.*; *see also* Comment of Catholic Legal Immigration Network, Inc. at 27, *available at* https://www.regulations.gov/document?D=USCIS-2010-0012-43255 (noting that Congress established an English language requirement for citizenship and not at the initial

stage when an individual is seeking admission to the United States). Including these factors to determine a person's likelihood of becoming a public charge is particularly irrational because recent immigrants are unlikely to have a credit history or credit scores, and the studies Defendants rely on regarding English language ability pertain to *non*-English speakers as opposed to those who are simply not proficient. *See* Defs.' Mot. at 13 (citing studies regarding non-English speakers); *see also* Comment of Nat'l Consumer Law Ctr. at 3, *available at* https://www.regulations.gov/document?D=USCIS-2010-0012-50351; Comment of Asian & Pac. Islander Am. Health Forum at 15, available at https://www.regulations.gov/document?D=USCIS-2010-0012-43805 (noting "significant difference between English proficiency and having no ability to speak the language"). Finally, as explained further below, *infra* sections E-F, the Rule is contrary to law because it was promulgated by officials invalidly appointed and not only has a racially disparate impact, but also was motivated by racial discrimination. FAC ¶¶ 197-206. Racism is not a "political consideration" or "Administration[] priorit[y]," *cf.* Defs.' Mot. at 17, that agencies may allow to influence their actions. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019) (allowing discovery to proceed where racial animus infected agency action).

E. Plaintiffs Have Sufficiently Pleaded that DHS Officials Responsible for the Rule Were Improperly Appointed

1. Plaintiffs Have Properly Pleaded that Defendant McAleenan Served Unlawfully

The parties agree that the succession at DHS is controlled by DHS' Organic Statute and the regulation promulgated under it, "DHS Orders of Succession and Delegations of Authorities for Named Positions" ("the DHS Orders"). *Compare* FAC ¶¶ 145-55 *with* Defs.' Mot. at 17-18. The DHS Orders put into effect on April 10, 2019, the day before McAleenan was appointed Acting Secretary and one day *after* the memorandum Defendants attached to the motion to dismiss was written, confirm that McAleenan's elevation was unlawful. Those orders are attached as Exhibit A to this Opposition.[7]

[7] Both of Plaintiffs' exhibits cited herein are cited in the FAC and are attached solely for convenience. *See* FAC ¶ 143 n.20; *see also* FAC ¶¶ 143, 148-53, 153 n.23 (discussing contents of documents).

The DHS Orders issued after the memorandum on which Defendants rely contained two relevant succession and delegation provisions: Section II.A and Section II.B. *See* Ex. A, at 1. Section II.A explicitly stated that in cases of "resignation" of the Secretary, "the orderly succession of officials is governed by Executive Order 13753, amended on December 9, 2016." *Id.* Executive Order 13753, in turn, establishes an order of succession in which the Commissioner of Customs and Border Protection, McAleenan's Senate-confirmed position, was seventh, behind two, then-serving Senate-confirmed officials. *See* 81 Fed. Reg. 90,667; FAC ¶¶ 149-52. Meanwhile, Section II.B explicitly states that it applies to situations in which the Secretary was "unavailable to act during a disaster or catastrophic emergency." Ex. A., at 1. Section II.B provided that an order of succession for that specific circumstance was laid out in "Annex A." *Id.* Thus, the DHS Orders set up two relevant orders of succession: Where the Secretary resigned, Executive Order 13753 controlled; where the Secretary was unavailable due to disaster or emergency, Annex A controlled.

On April 10, Defendants amended the order of succession only for Annex A, and that amendment was reflected in the April 10 DHS Orders. Ex. A, at A-1. And Annex A applied only where the Secretary was "unavailable to act during a disaster or catastrophic emergency." *Id.* at 1. As a result, DHS's placing of the Commissioner of Customs and Border Protection third in line in Annex A on April 10 had no effect on the order of succession when a Secretary resigned from office, as happened here. Section II.A, which controlled in that situation, remained the applicable provision. And under the succession order referenced in Section II.A, laid out in Executive Order 13753, McAleenan was not next in line. McAleenan's appointment was therefore invalid.

Defendants' sole contrary argument is that the Court should ignore the DHS Orders' unambiguous text because Defendants believe a memorandum accompanying the amendment indicated that Secretary Nielsen *intended* to elevate McAleenan. But any purported intent that is contrary to the plain regulatory text is irrelevant. *See Bostock v. Clayton Cty., Ga.*, -S. Ct.-, No. 17-1618, 2020 WL 3146686, at *9 (June 15, 2020) ("[N]one of these contentions about what [Defendants] think the law was meant to do, or should do, allow [the Court] to ignore the law as it is."); *United States v. Bucher*, 375 F.3d 929, 932 (9th Cir. 2004) ("As with legislation, we presume

the [regulation's] drafters said what they meant and meant what they said."). Moreover, these arguments about intent are factual, and thus cannot be grounds to grant Defendants' Motion to Dismiss. *See TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (noting that review of motion to dismiss requires "draw[ing] all reasonable inferences in favor of the nonmoving party"); *see also Juarez v. Utah Dep't of Public Health-Family Dental Plan*, No. 2:05CV0053 PGC, 2006 WL 2037574, at *1 (D. Utah July 18, 2006) ("[C]laims, like those involving state of mind (e.g. intent) are often unsuitable for a Rule 12(b)(6) motion.") (internal quotation marks and citation omitted).

Lest there were any doubt regarding the applicable order of succession, Defendants' subsequent actions to correct the mistake they had previously made confirm the plain language of the DHS Orders' text. On November 18, 2019, McAleenan issued a new "Amendment to the Order of Succession for the Secretary of Homeland Security." That Amendment is attached as Exhibit B. The Amendment stated that "Section II.A . . . is amended hereby to state as follows: In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the order of succession of officials is governed by Annex A." Ex. B. Thus, in November of 2019, *after the rule was issued*, DHS altered its order of succession such that Annex A controls when the Secretary resigns. Such action would have been entirely superfluous if, as Defendants now claim, Annex A *already* applied when the Secretary resigned.

Plaintiffs have sufficiently pleaded that the Rule was issued by an invalid officer in violation of the APA and FVRA.

2. Plaintiffs Have Sufficiently Pleaded that Cuccinelli's Appointment Violates the FVRA and Renders the Rule Unlawful Under the APA

Plaintiffs have sufficiently pleaded their FVRA and APA claims regarding Cuccinelli's unlawful appointment. First, Defendants' perfunctory claim that Cuccinelli served lawfully has been repudiated. *See L.M.-M. v. Cuccinelli*, -F. Supp. 3d.-, No. 19-2676 (RDM), 2020 WL 985376 (D.D.C. Mar. 1, 2020) (invalidating actions by Cuccinelli due to unlawful service as Acting Director of USCIS). Second, Defendants misunderstand Plaintiffs' claim. Plaintiffs contend that Cuccinelli's pre-promulgation involvement likely entailed taking FVRA-defined action. That claim, pleaded in the First Amended Complaint, is based in part upon Cuccinelli's

statements and news reports regarding his involvement with the Rule, FAC ¶ 161, at least requires further discovery before Cuccinelli can be described as insufficiently important or the Court can confirm that he did not take an action for purposes of the FVRA, both of which require determinations of *fact*.

Additionally, Defendants entirely fail to address Plaintiffs' APA-based claim involving Cuccinelli, which is related to but distinct from Plaintiffs' FVRA claim. *Compare* FAC ¶¶ 204-06 (APA-related vacancy claim) *with* ¶¶ 214-18 (FVRA-related vacancy claim). Plaintiffs' APA claim is that Cuccinelli was unlawfully appointed, and the substantial involvement of an improperly appointed official in promulgating the Rule renders it not "in accordance with law" under the APA. The FVRA controls who may perform the functions or duties of a vacant position for which Presidential Appointment and Senate confirmation is otherwise required. 5 U.S.C. § 3345(a). Separate from that provision, the FVRA provides a remedy in Section 3348 to redress an action, function, or duty taken by an unlawfully appointed official. *Id.* § 3348. Thus, whether an official is unlawfully appointed under Section 3345(a) and whether the FVRA offers a remedy under Section 3348 are distinct questions. *See SW Gen., Inc. v. NLRB*, 796 F.3d 67, 78-82 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017) (appointment violated Section 3345, but because Section 3348 exempts NLRB general counsel, evaluating separately the remedial question). For purposes of their APA claim, Plaintiffs contend that Cuccinelli's appointment violated Section 3345, and because he was invalidly exercising authority when, as Defendants do not dispute, he contributed to the promulgation of the Rule, the Rule was not promulgated "in accordance with law." 5 U.S.C. § 702. A district court recently found agency directives not "in accordance with law" based on this very argument regarding Cuccinelli. *L.M.-M.*, 2020 WL 985376, at *23-25. Plaintiffs have sufficiently pleaded these APA-based claims to survive Defendants' Motion to Dismiss.

F. Plaintiffs Have Sufficiently Alleged a Violation of Equal Protection

Plaintiffs have sufficiently stated a claim for violation of the Equal Protection component of the Fifth Amendment. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of

intent as may be available." *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015); *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1038 (9th Cir. 2020) (en banc). The Supreme Court's intent analysis from *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 25 (1977), articulated the following, non-exhaustive factors that a court should consider in assessing whether a defendant acted with discriminatory purpose:

> (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision; (3) the specific sequence of events leading to the challenged action; (4) the defendant's departures from normal procedures or substantive conclusions; and (5) the relevant legislative or administrative history.

Arce v. Douglas, 793 F.3d 968, 977 (9th Cir. 2015) (citing *Arlington Heights*, 429 U.S. at 266-68). A plaintiff need not establish any particular factor in order to prevail on the merits of their claim. *See Pac. Shores Props. v. City of Newport Beach*, 730 F.3d 1142, 1156 (9th Cir. 2013). Here, Plaintiffs have adequately alleged sufficient facts pertaining to these factors to meet Rule 8's minimal pleading requirements. *See Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 504-08 (9th Cir. 2016) (holding plaintiffs had plausibly alleged racial animus under *Arlington Heights* through allegations of racially-charged language and "code words," community animus, and irregular government procedures).

First, Plaintiffs plausibly allege that the Rule will bear more heavily on non-white immigrants. FAC ¶¶ 120-21. Indeed, DHS has *acknowledged* the Rule's disparate impact on non-white immigrants. *See* 84 Fed. Reg. at 41,369 ("DHS recognizes that it is possible that the inclusion of benefits such as SNAP and Medicaid may impact in greater numbers communities of color, including Latinos and AAPI, . . . and therefore may impact the overall composition of immigration with respect to these groups.").[8]

[8] The Supreme Court's recent decision in *Regents* held, following well-established law, *see Washington v. Davis*, 426 U.S. 229, 242 (1976), that a mere allegation of disparate impact is almost always insufficient to state an Equal Protection claim under *Arlington Heights*. *Dep't of Homeland Sec.*, 2020 WL 3271746, at *16; *see also Flowers v. City of Los Angeles*, 36 F.3d 1102 (9th Cir. 1994)("[A]bsent a clear pattern of disparate treatment, inexplicable on grounds other than race, 'disparate impact alone is not determinative, and the Court must look to other evidence.'") (quoting *Arlington Heights*, 429 U.S. at 266); *Snoqualmie Indian Tribe v. City of Snoqualmie*, 186

Second, Defendants describe Administration officials' consistent racist comments regarding immigrants as "a handful of stray comments." Defs.' Mot. at 19. That is factually incorrect and, in any event, Plaintiffs need not plead more to survive a motion to dismiss, where only plausibility and not quantity is at issue. Plaintiffs have plausibly alleged that the Trump Administration was motivated, at least in part, by racial animus, pointing to a pattern of racist conduct and statements by relevant officials.[9] FAC ¶¶ 123-37. These actions and statements were made by DHS officials directly involved in the rulemaking, as well as higher-level officials in the Trump Administration who are plausibly alleged to have been involved in the Rule's promulgation by pressuring and directing DHS officials. *Arlington Heights*, 429 U.S. at 268 (possible evidence of discriminatory purpose includes "contemporary statements by members of the decisionmaking body"). President Trump was making his anti-immigrant and anti-Latino statements essentially contemporaneously with his Administration drafting an executive order that would have changed the public charge test in much the same way that the final Rule did. FAC ¶¶ 90, 123-30. In fact, Cuccinelli himself linked the President directly the Rule. FAC ¶ 133 (stating that the Rule showed that President Trump was once again "delivering on his promises"). Indeed, Plaintiffs allege that the White House exerted significant influence over the promulgation of the Rule through Stephen Miller, Senior Adviser to the President who was "singular[ly] obsess[ed]" with the racially disparate rule. FAC ¶¶ 130-32. Plaintiffs allege that Miller pressured DHS officials to promulgate the Rule, and even ousted the Director of USCIS over his failure to do so sufficiently quickly.

F. Supp. 3d 1155, 1164 (W.D. Wash. 2016) (same). That case has no bearing here, as Plaintiffs have sufficiently alleged more than disparate impact. FAC ¶¶ 123-26.

[9] Courts have routinely found that Trump's own words sufficiently allege racist intent. *See, e.g.*, *CASA de Md.*, 355 F. Supp. 3d at 325-26 ("Defendants do not suggest that President Trump's alleged statements are not evidence of discriminatory motive on his part, nor could they. One could hardly find more direct evidence of discriminatory intent towards Latino immigrants."); *La Union del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381, 395 (D. Md. 2018) (denying motion to dismiss, *inter alia*, Equal Protection claims regarding immigrants of color in challenge to adding citizenship question to 2020 Census); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1108 (N.D. Cal. 2018) (granting preliminary injunction in challenge to decision to end TPS for El Salvador, Haiti, Honduras, and Nicaragua); *Centro Presente v. DHS*, 332 F. Supp. 3d 393, 415 (D. Mass. 2018) (denying motion to dismiss as to Equal Protection claim in challenge to ending TPS for El Salvador, Haiti, and Honduras).

FAC ¶¶ 131-32, 157. Accordingly, rather than a few stray comments, Plaintiffs have alleged an unbroken chain of intent running from President Trump's racism to the final Rule, including specific racist remarks while the Rule was in final review.

As to the third and fourth *Arlington Heights* factors, the sequence of events leading to the challenged action and substantive departures from the normal decision-making procedure evidence a discriminatory motive underlying the Rule. As Plaintiffs allege, Defendants unlawfully appointed McAleenan and Cuccinelli to become Acting Directors of DHS and USCIS respectively, FAC ¶¶ 145-61, in part for the purpose of effectuating the administration's anti-immigration priorities. The manipulation of succession to those positions is at the very least extraordinary meddling. Plaintiffs also allege that the White House exerted unusual and improper influence over the promulgation of the Rule through Miller. FAC ¶¶ 130-32.

Addressing the fifth factor, Defendants assert that simply by virtue of drafting a 200-page preamble, the Rule is inoculated against any racial animus. Defs.' Mot. at 21. Defendants also contend that the notice-and-comment process and subsequent changes to the Rule somehow undermine any allegations that the Rule was motivated in part by racial animus. *Id.* But given that "officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority, [courts] look to whether they have "camouflaged" their intent. *Arce*, 793 F.3d at 978 (internal quotation marks omitted). Moreover, Plaintiffs do not have to prove that "the discriminatory purpose was the 'sole' purpose of the challenged action, but only that it was *a* 'motivating factor.'" *Id.* at 977 (citing *Arlington Heights*, 429 U.S. at 266). Plaintiffs have thus sufficiently alleged that the Rule was motivated "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" non-white non-citizens. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

Defendants rely on *Trump v. Hawaii* to argue that the Court should ignore *Arlington Heights* and instead apply a rational basis standard. Defs.' Mot. at 20. In *Hawaii*, the Supreme Court applied a more deferential standard of review of an Executive Order purportedly grounded in national security claims and involving entry into the United States. 138 S. Ct. 2392, 2419-20

(2018). Neither of those factors are present here. The Rule at issue concerns immigrants already within the United States, and neither Defendants nor the Rule itself claim that the Rule is related to national security. Defs.' Mot. at 21; *see* 84 Fed. Reg. at 41,295, 41,308. Multiple courts have thus rejected Defendants' reliance on *Hawaii* in challenges to the public charge provision. S*ee Cook Cty., Ill. v. Wolf*, -F. Supp. 3d.-, No. 19 C 6334, 2020 WL 2542155, at *6-7 (N.D. Ill. May 19, 2020) [hereinafter *Cook Cty. III*] (applying *Arlington Heights* to the Rule); *Make the Road N.Y.*, 419 F. Supp. 3d at 664(same); *see also Mayor & City Council of Baltimore v. Trump*, 416 F. Supp. 3d 452, 492 (D. Md. 2019) (applying *Arlington Heights* in challenge to changes in the Department of State public charge provision).

Because Plaintiffs have sufficiently pleaded a violation of the Equal Protection guarantee of the Fifth Amendment, the Court should not dismiss their Equal Protection claim.

G. Plaintiffs Have Sufficiently Alleged that the President Is a Proper Defendant

This Court can issue relief against the President. Notwithstanding *Mississippi v. Johnson*, 71 U.S. 475 (1867), courts routinely issue and uphold relief enjoining the official actions of a sitting President. *See, e.g., United States v. Nixon*, 418 U.S. 683 (1974); *Boumediene v. Bush*, 553 U.S. 723 (2008); *E. Bay Sanctuary II*, 950 F.3d 1242 (9th Cir. 2020); *see generally* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited,* 97 Colum. L. Rev. 1612 (1997) (collecting cases since *Mississippi* in which courts have entertained suits seeing relief against the President). This Court should follow the widespread practice, including in the Ninth Circuit, of issuing relief against the President where he is properly alleged as a Defendant.

V. CONCLUSION

For the reasons above, this Court should deny Defendants' Motion to Dismiss in its entirety.

Respectfully submitted,

Dated: July 1, 2020 By: */s/ Nicholas Espíritu*

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EXHIBIT A

Department of Homeland Security
DHS Delegation Number: 00106
Revision Number: 08.5
Issue Date: 12/15/2016
Updated Date: 04/10/2019

DHS ORDERS OF SUCCESSION AND DELEGATIONS OF AUTHORITIES FOR NAMED POSITIONS

I. Purpose

This is a succession order for named positions and a delegation of authority for the continuity of essential functions of officials at the Department of Homeland Security (DHS) in case of absence, the inability of the incumbent to act during disasters or catastrophic emergencies, or vacancies in offices.

II. Succession Order/Delegation

A. In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the orderly succession of officials is governed by Executive Order 13753, amended on December 9, 2016.

B. I hereby delegate to the officials occupying the identified positions in the order listed (Annex A), my authority to exercise the powers and perform the functions and duties of my office, to the extent not otherwise prohibited by law, in the event I am unavailable to act during a disaster or catastrophic emergency.

C. The order of succession for the named positions, other than the Office of the Secretary, are provided in Annexes B through AC.

D. I hereby delegate authority to the officials occupying the identified positions in the orders listed in Annexes B through AC to exercise the powers and perform the functions and duties of the named positions in case of death, resignation, inability to perform, absence, or inability to act during a disaster or catastrophic emergency until that condition ceases.

E. In terms of named positions in which appointment is required to be made by the President, by and with the advice and consent of the Senate (PAS), if positions are vacant as that term is used in the Federal Vacancies Reform Act of 1998, the First Assistant shall act as the incumbent until a successor is appointed, unless otherwise designated by the President. The individual serving in the position identified as the first to succeed is designated the "First Assistant" for the purposes of the Federal Vacancies Reform Act of 1998. If the First Assistant position is vacant, the next designated official in the order of succession may exercise all the powers, duties, authorities, rights, and functions authorized by law to be exercised by the incumbent, but may not perform any function or duty required by law to be performed exclusively by the office holder.

F. For all other positions that are not subject to the Federal Vacancies Reform Act of 1998, any official in the order provided for in the succession order may exercise all the powers, duties, authorities, rights, and functions authorized to be performed by the incumbent, to the extent not otherwise limited by law.

G. Only officials specifically designated in the order of succession for each of the named positions in Annexes B through AC are eligible, subject to modification in accordance with Section II.I. Unless formally appointed by the Secretary, persons appointed on an acting basis, or on some other temporary basis, are ineligible to serve as a successor; therefore, the order of succession would fall to the next designated official in the approved order of succession.

H. The prohibition on any re-delegation of powers, authorities, functions, and duties contained in Departmental Delegations, Directives, Management Directives, Instructions, Manuals, or similar internal documents is not applicable to restrict the authority of any individual who is exercising the authority of a vacant position under this Delegation. Such an individual shall, however, be bound by such Departmental Delegations, Directives, Management Directives, Instructions, Manuals, or similar internal documents, and shall not further re-delegate powers to any individual.

I. Each Annex may be updated separately. A Component Head seeks modification of his/her order of succession by forwarding a proposed updated Annex to the Office of Operations Coordination (OPS), Continuity Division and the Office of the Under Secretary for Management (MGMT), Program Manager, Delegations and Directives; Annexes are processed by MGMT, in consultation with the Office of the General Counsel (OGC), for approval of the Secretary. At a minimum, the Annex is coordinated with OGC and the White House Liaison. Where possible, Component orders of succession should be at least three positions deep and geographically dispersed.

J. The Office of the Executive Secretary, MGMT, and OPS are responsible for maintaining a current list of incumbents holding all positions identified in Annexes B through AC.

K. Nothing in this delegation is intended to limit my discretion as Secretary to depart from this delegation.

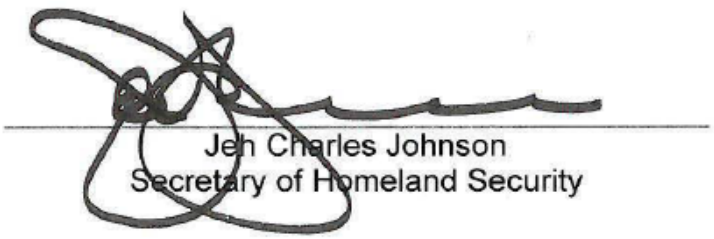
III. Authorities

A. Title 5, United States Code (U.S.C.) §§ 3345-49 (Federal Vacancies Reform Act of 1998, as amended)

B. Title 6, U.S.C., § 112 (Secretary; functions)

IV. Office of Primary Interest

OPS and MGMT is the office of primary interest for maintaining and updating the Annexes to this Delegation.



Jeh Charles Johnson
Secretary of Homeland Security

Dec 15 2016
Date

Legend

Career	C
Limited Term Appointment	L
Military Officer	M
Non-Career in the Senior Executive Service or Schedule C	N
Presidential Appointee	P
Presidential Appointee with Senate Confirmation	S
Scientific Professional	T
First Assistant pursuant to the Federal Vacancies Reform Act	*

ATTACHMENT 1

DHS ORDERS OF SUCCESSION AND ORDERS FOR DELEGATIONS OF AUTHORITIES

Annex	Title	Issue Date
Annex A	Order For Delegation of Authority by the Secretary of the Department of Homeland Security	Revision 08.5, 04/10/2019
Annex B	Deputy Secretary, Office of the	Revision 08.5, 04/10/2019
Annex C	Citizenship and Immigration Service Ombudsman	Revision 06, 09/14/2016
Annex D	Citizenship and Immigration Services, United States	Revision 06, 09/14/2016
Annex E	Civil Rights and Civil Liberties, Office for	Revision 06, 09/14/2016
Annex F	Coast Guard, United States	Revision 06, 09/14/2016
Annex G	Countering Weapons of Mass Destruction Office	Revision 08.2, 05/21/2018
Annex H	Customs and Border Protection, United States	Revision 06, 09/14/2016
Annex I	Executive Secretariat	Revision 06, 09/14/2016
Annex J	Federal Emergency Management Agency	Revision 06, 09/14/2016
Annex K	Federal Law Enforcement Training Center	Revision 06, 09/14/2016
Annex L	General Counsel, Office of the	Revision 06, 09/14/2016
Annex M	Immigration and Customs Enforcement, United States	Revision 06, 09/14/2016
Annex N	Inspector General, Office of	Revision 06, 09/14/2016
Annex O	Intelligence and Analysis, Office of	Revision 06, 09/14/2016
Annex P	Legislative Affairs, Office of	Revision 06, 09/14/2016
Annex Q	Management Directorate	Revision 06, 09/14/2016
Annex R	National Protection and Programs Directorate	Revision 08, 07/11/2017
Annex S	Operations Coordination, Office of	Revision 06, 09/14/2016
Annex T	Partnership and Engagement, Office of	Revision 06, 09/14/2016
Annex U	Strategy, Policy, and Plans, Office of	Revision 08.4, 02/15/2019
Annex V	Privacy Office, Chief	Revision 06, 09/14/2016
Annex W	Public Affairs, Office of	Revision 06, 09/14/2016
Annex X	Science and Technology	Revision 07, 01/19/2017
Annex Y	Secret Service, United States	Revision 06, 09/14/2016
Annex Z	Transportation Security Administration	Revision 08.3, 10/23/2018
Annex AA	Chief Financial Officer (DHS)	Revision 06, 09/14/2016
Annex AB	Deputy Administrator, Federal Emergency Management Agency (FEMA)	Revision 06, 09/14/2016
Annex AC	Protection and National Preparedness (FEMA)	Revision 06, 09/14/2016

ANNEX A

ORDER FOR DELEGATION OF AUTHORITY BY THE SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY

Pursuant to Title 6, United States Code, Section 113(g)(2)

1. Deputy Secretary of Homeland Security
2. Under Secretary for Management
3. Commissioner of U.S. Customs and Border Protection
4. Administrator of the Federal Emergency Management Agency
5. Director of the Cybersecurity and Infrastructure Security Agency
6. Under Secretary for Science and Technology
7. Under Secretary for Intelligence and Analysis
8. Administrator of the Transportation Security Administration
9. Director of U.S. Immigration and Customs Enforcement
10. Director of U.S. Citizenship and Immigration Services
11. Under Secretary for Strategy, Policy, and Plans
12. General Counsel
13. Deputy Under Secretary for Management
14. Deputy Commissioner of U.S. Customs and Border Protection
15. Deputy Administrator of the Transportation Security Administration
16. Deputy Director of U.S. Immigration and Customs Enforcement
17. Deputy Director of U.S. Citizenship and Immigration Services
18. Director of the Federal Law Enforcement Training Centers

EXHIBIT B

Amendment to the Order of Succession for the Secretary of Homeland Security

Section II.A of DHS Delegation No. 00106, *DHS Orders of Succession and Delegations of Authorities for Named Positions*, is amended hereby to state as follows: "In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the order of succession of officials is governed by Annex A."

By the authority vested in me as Secretary of Homeland Security, including the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2), I hereby designate the order of succession for the Secretary of Homeland Security by amending Annex A of DHS *Orders of Succession and Delegations of Authorities for Named Positions*, Delegation No. 00106. Annex A is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof:

Annex A, Order for Delegation of Authority by the Secretary of the Department of Homeland Security
Pursuant to Title 6, United States Code, Section 113(g)(2)

1. Deputy Secretary of Homeland Security;

2. Under Secretary for Management;

3. Commissioner of the U.S. Customs and Border Protection;

4. Under Secretary for Strategy, Policy, and Plans;

5. Administrator and Assistant Secretary of the Transportation Security Administration;

6. Administrator of the Federal Emergency Management Agency;

No individual who is serving in an office herein listed in an acting capacity, by virtue of so serving, shall act as Secretary pursuant to this designation.

Dated: 11/08/19

Kevin K. McAleenan
Acting Secretary of Homeland Security