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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LA CLINICA DE LA RAZA, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.* Defendants.	Case No. 4:19-cv-04980-PJH **REPLY IN SUPPORT OF MOTION TO DISMISS THE AMENDED COMPLAINT** Date: Hearing vacated Courtroom: 3 Judge: Hon. Phyllis J. Hamilton

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I. Plaintiffs Fail to Establish that They Have Article III Standing and Fall Within the Relevant Zone of Interests

The Plaintiff organizations cannot establish standing by simply alleging that they diverted resources in response to the Rule. For organizational standing, they "must . . . show that [they] would have suffered some other injury if [they] had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010); *see also id.* at 1088 n.4 ("An organization may sue only if it was forced to choose between suffering an injury and diverting resources to counteract" it). The "other injury" they allegedly would have suffered, but for resource diversion, cannot be only that their "mission [would be] compromised" in the abstract, but must be a "perceptibl[e] impair[ment]" to their "ability to provide services." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015).

Here, there is no allegation that the Rule will "perceptibly impair" any of Plaintiffs' concrete activities if they do not divert resources in response to the Rule. Plaintiffs allege only that, but for their resource expenditure, the Rule would interfere with their ultimate mission. But plaintiffs must allege "more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Plaintiffs have not shown that they were "forced to choose between suffering an injury and diverting resources to counteract" it, and thus they lack standing. *La Asociacion*, 624 F.3d at 1088 n.4.

Plaintiffs proffer two alternative theories for standing. First, they claim that at least one Plaintiff—CPCA—may claim associational standing since its members (who are themselves organizations) have been injured by the Rule. But this theory fails for the same reason as Plaintiffs' principal basis for standing: Plaintiffs must show that the member organizations have organizational standing, and yet they fail to allege that the Rule "perceptibly impaired" their activities, and thus forced them to divert resources. Plaintiffs then argue that they will receive less funding since they may end up assisting fewer persons. It is unclear, however, how this constitutes an "injury" if the drop in funding is commensurate with a drop in the quantity of services they

have to provide. Ultimately, Plaintiffs might not suffer any *net* financial harm. Accordingly, Plaintiffs have failed to establish standing for any of their claims.

Even if Plaintiffs could establish Article III standing, they are not the "proper part[ies] to invoke judicial resolution of the dispute[s]" in this litigation. *Warth v. Seldin*, 422 U.S. 490, 518 (1975). To pursue their claims, Plaintiffs must "establish that" their alleged injuries fall "within the 'zone of interests' sought to be protected by" the provisions which "form[] the legal basis" for their claims. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). Plaintiffs fall outside of this zone if their "interests are . . . marginally related to or inconsistent with the purposes implicit in the statute." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

Here, Plaintiffs' alleged injuries—*i.e.*, their alleged diversion of resources to assist immigrants—are, at best, only marginally related to the public charge inadmissibility provision's purpose of identifying and rendering inadmissible those likely to become public charges. *See* PI Order, ECF No. 131, at 72 (Plaintiffs "fail[ed] too explain how their interests relate to" the public charge inadmissibility provision's purpose: "excluding immigrants likely to become public charges."). In an analogous public charge lawsuit, the Seventh Circuit recently expressed doubt over whether the organization plaintiff there fell within the relevant zone of interests. The organization there "helps immigrants navigate the INA's various requirements" and it asserted a "financial burden directly attributable to the Rule," "[b]ut the link between these injuries and the purpose of the public-charge part of the statute is . . . attenuated, and thus it is harder to say that the injury [the organization] has asserted meets the 'zone-of-interests' test." *Cook Cty., Illinois v. Wolf*, No. 19-3169, 962 F.3d 208, 221 (7th Cir. June 10, 2020). This reasoning applies equally here.

In response, Plaintiffs first argue that they assist those who may be subject to public charge determinations. *See* Pls' Opp'n to Defs' Mot. to Dismiss ("Opp'n), ECF No. 167, at 7. But Plaintiffs do not fall within the relevant zone of interests simply because they assist the persons

who *do* fall within the zone of interests.[1] Plaintiffs then argue that the public charge inadmissibility provision regulates the "health and economic status of immigrants," and that Plaintiffs provided services to protect immigrants' health and economic wellbeing. Opp'n at 9. But this mirrors Plaintiffs' first argument: Plaintiffs argue that the Rule affects immigrants in a certain manner, and Plaintiffs are seeking to help those immigrants. Again, even if the immigrants whose health and economic status has been impacted may fall within the relevant zone of interests, Plaintiffs' interest in assisting them is too far attenuated. Finally, Plaintiffs argue that the Rule acknowledges that organizations may be affected by the Rule. Opp'n at 9-10. This, however, says nothing of whether Plaintiffs fall within the zone of interests of the statutory public charge inadmissibility provision. Although the Rule may acknowledge that organizations may be tangentially affected, it certainly does not show that Congress intended to allow such organizations to file suit.

Finally, Plaintiffs also fall outside of the zone of interests of the equal protection clause. "The purpose of the equal protection clause" is to "secure every person . . . against intentional and arbitrary discrimination." *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918). Of course, Plaintiffs do not allege that *they* were subject to any discrimination, and thus they are not within the relevant zone of interests. In response, Plaintiffs argue that Defendants waived this argument because Defendants raised it in a footnote. But that footnote was part of Defendants' broader zone of interests argument applicable to all of Plaintiffs' claims, Mot. to Dismiss the Am. Compl. ("Motion"), ECF No. 166, at 9 n.4. In any event, Plaintiffs have briefed the argument so there is no basis to deem it waived.[2]

Plaintiffs then argue that the zone of interests test may not apply to a constitutional claim. But the Supreme Court explicitly framed the inquiry as "whether the interest sought to be protected

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[1] Plaintiffs relatedly argue that another statutory provision—8 U.S.C. § 1362—grants aliens the right to a legal representative, thus suggesting that legal service providers come within the zone of interests. But this, at most, suggests that legal service providers may effect section 1362. It says nothing of whether they—or the non-legal service organization Plaintiffs—come within the zone of interests of the public charge inadmissibility provision.

[2] Plaintiffs also argue that Defendants have waived any argument that Plaintiffs are beyond the zone of interests for Plaintiffs' vacancy claims. Opp'n at 5. But those claims challenge the Rule and are necessarily APA claims, *see* Section V *infra*, which are subject to the same zone of interest analysis as Plaintiffs' other APA claims.

by the complainant is arguably within the zone of interests to be protected or regulated by the statute *or constitutional guarantee in question*." *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (emphasis added). And regardless, the Court could still consider Defendants' argument—that Plaintiffs are not the proper parties to bring their equal protection claim—under the related third-party standing test. *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014) ("[T]hird-party standing is closely related to the question whether a person in the litigant's position will have a right of action on the claim."). There are "three requirements for third-party standing: (1) injury-in-fact; (2) close relationship to the third party; and (3) hindrance to the [third party's ability to protect his or her own interests]." *Coal. of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002). Here, Plaintiffs have shown neither an injury-in-fact nor a hindrance preventing aliens subject to any alleged, unlawful discrimination from bringing suit and protecting their own rights. Accordingly, Plaintiffs are not the proper parties for their equal protection claim.

II. Plaintiffs Fail to State a Claim that the Rule Conflicts with the Immigration and Nationality Act ("INA")

Plaintiffs' primary contention is that "as this Court previously noted, the Rule drastically departs from over a century's interpretation of the term 'public charge.'" Opp'n at 1. But Plaintiffs concede in the same breath that the Ninth Circuit "express[ly] disagree[d] with these conclusions." *Id.* at 2; *see also City & Cty. of S.F. v. United States Citizenship & Immigration Servs.*, 944 F.3d 773, 800 (9th Cir. 2019). Plaintiffs retreat, therefore, to the position that the Ninth Circuit's "decision is not binding on this Court" because the motions panel "applied a higher burden than applicable here." Opp'n at 2. Plaintiffs are wrong, both on the merits of their contrary-to-law claims and on the import of the Ninth Circuit's rejection of those claims.

A. The Ninth Circuit's Rulings in *San Francisco* Bind this Court

Plaintiffs argue that they need only give "fair notice" of a "cognizable legal theory." Opp'n at 10-11 (citing *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008)). But the Ninth Circuit has concluded that Plaintiffs' contrary-to-INA claim is *not* cognizable. That conclusion should bind this Court.

The Ninth Circuit's ruling in *San Francisco* constitutes law-of-the-circuit and law-of-the-case, which binds this Court. Unlike a non-binding memorandum disposition, the Ninth Circuit has "unequivocally stated that a published decision constitutes binding authority and must be followed unless and until it is overruled by a body competent to do so." *In re Zermeno-Gomez*, 868 F.3d 1048, 1053 (9th Cir. 2017). Contrary to Plaintiffs' argument, the decision in *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) does not change this rule for opinions issued by motions panels. *East Bay* addresses only whether a Ninth Circuit merits panel may reconsider a decision by a Ninth Circuit motions panel. The *East Bay* court ruled that the motions panel decision in that case was "persuasive, but not binding" on the merits panel. *Id*. at 1265. The *East Bay* decision focused primarily on the law-of-the-case doctrine.[3] As the court noted, the law-of-the-case doctrine is discretionary, *id*. at 1261, and its ruling that it was not bound by the motions panel's decision is an application of that discretion. *Id*. ("We do sometimes exercise our discretion to reconsider issues within the same case."). Law-of-the-case works differently for district courts, however. Where an issue is determined by an appellate court, application of the doctrine is *not* discretionary for district courts. *See Papenthien v. Papenthien*, 16 F. Supp. 2d 1235, 1238 (S.D. Cal. 1998) ("Under the 'law-of-the-case' doctrine, 'when matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court.'") (quoting *Insurance Group Comm. v. Denver & Rio Grande W. R.R.*, 329 U.S. 607, 612 (1947)). Thus, while the Ninth Circuit may reconsider its rulings, this Court may not.

Moreover, the "good policy and practical reasons" identified in *East Bay* for excepting motions panel decisions from law-of-the-case status do not apply with much force here. Although

[3] In addition to the law-of-the-case doctrine, the *East Bay* court also briefly addressed the law-of-the-circuit doctrine, and its reasoning there was derivative of its conclusion regarding law-of-the-case. *East Bay*, 950 F.3d at 1263 n.3. Notably, in discussing law-of-the-circuit, the court indicated a distinction between how that doctrine applies to "later merits panels" as compared to "inferior courts in the circuit." *Id*. The court stated: "[T]he first panel to consider an issue sets the law . . . for all the inferior courts in the circuit and future panels of the court of appeals, but motions panels conclusions do not set the law *for later merits panels* in the same case[.]" *Id*. (internal citations and quotation marks omitted; emphasis added). Thus, according to *East Bay*, the "first panel to consider an issue sets the law . . . for all the inferior courts in the circuit," without any exception for decisions by a motions panel. *Id*.

the stay was entered "without oral argument, on limited timelines, and in reliance on limited briefing," the record before the motions panel was not "incomplete." *East Bay*, 950 F.3d at 1263. Plaintiffs' contrary-to-law claim is purely legal—it requires no record. *Cf. San Francisco*, 944 F.3d at 790-800 (concluding that the Rule is not contrary to law without relying on any factual record). Therefore, the record is neither incomplete nor likely to change. More importantly, the motions panel decision in this case was not "issued without opinion" or "explanation[]." *East Bay*, 950 F.3d at 1263. The majority issued a *60-page* written opinion canvassing the history and precedent surrounding the term "public charge" and inspecting the Rule for compliance with the Administrative Procedure Act. *See Fish v. Schwab*, 957 F.3d 1105, 1141 (10th Cir. 2020) ("Here, however, the *Fish I* panel was able to consider the issue fully and issue a lengthy opinion discussing pure issues of law. . . . We, like our sister circuits, think that it makes eminent sense to apply the law of the case doctrine in these circumstances."). If nothing else, however, a motions panel decision is at least "persuasive" on a subsequent Ninth Circuit merits panel and will not "lightly [be] overturn[ed.]" *East Bay*, 950 F.3d at 1262, 1265. If the Court determines that the *San Francisco* opinion is not binding on it, the Court should at least give the opinion as much deference as a Ninth Circuit merits panel would.

Lastly, Plaintiffs are clearly mistaken in contending that the Court cannot resolve this claim on a motion to dismiss. On the contrary, a "Rule 12(b)(6) motion to dismiss can be entertained in administrative law cases if the complaint 'presents no factual allegations, but rather only arguments about the legal conclusion[s] to be drawn about the agency action[.]'" *R.J. Reynolds Tobacco Co. v. U.S. Dep't of Agric.*, 130 F. Supp. 3d 356, 369 (D.D.C. 2015). "In such a case, 'the sufficiency of the complaint is the question on the merits, and there is no real distinction . . . between the question presented on a 12(b)(6) motion and a motion for summary judgment.'" *Id.* Plaintiffs concede that the dispute in count one is whether their "legal theory" is cognizable. Opp'n at 11. That dispute can and should be decided on a motion to dismiss. *See Izaguirre-Ramos v. INS*, No. 93-70222, 1994 U.S. App. LEXIS 31322, at *5 (9th Cir. Nov. 7, 1994) ("Issues of statutory interpretation are questions of law[.]").

B. None of Plaintiffs' Three Criticisms of the Ninth Circuit's Opinion Is Valid

Plaintiffs argue that the Ninth Circuit "failed in at least three key ways." Opp'n at 12. None of those perceived failures is grounds to deny Defendants' motion. First, Plaintiffs suggest that the Rule's definition does not "fit within any definition of the public charge test *employed* in the 140-year history of the term." Opp'n at 12 (emphasis added). That distorts the *Chevron* standard, under which an agency's interpretation need not have been employed previously; it need only fit within the bounds of the statute. "The Final Rule easily satisfied this test." *San Francisco*, 944 F.3d at 799. Although "under the Final Rule, in-kind benefits (other than institutionalization) will for the first time be relevant to the public-charge determination," there is "no statutory basis from which a court could conclude that the addition of certain categories of in-kind benefits makes DHS's interpretation untenable." *Id.* at 799 & n.17.

Second, Plaintiffs argue that the Ninth Circuit never "explained" how the Rule can deem individuals to be public charges based on supposedly "negligible amounts" of such in-kind benefits. Opp'n at 12. But the Ninth Circuit cited the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), which reaffirmed that "[i]t continues to be the immigration policy of the United States that . . . aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations." *San Francisco*, 944 F.3d at 799 (quoting 8 U.S.C. § 1601(2)). Thus, "[r]eceipt of non-cash public assistance is surely relevant to 'self-sufficiency' and whether immigrants are 'depend[ing] on public resources to meet their needs.'" *Id.* (citing 8 U.S.C. § 1601(1)-(2); *Korab v. Fink*, 797 F.3d 572, 580 (9th Cir. 2014)).

Third, Plaintiffs fault the Ninth Circuit for failing 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." Opp'n at 12 (citing PI Op. at 48). As an initial matter, that is not what the Court reasoned in its preliminary injunction opinion. *Compare* PI Op. at 48 ("[P]laintiffs demonstrate that in a single year, roughly *a quarter* U.S.-born citizens receive one or more benefits used to define who is a public charge under the Rule," and "that, over the course of their lifetimes, about 40% of U.S.-born citizens are expected to receive *one or more of those benefits*.") (emphasis added). But more

importantly, this Court only considered that statistic significant in light of its view of the "history of the term." *Id.* The Ninth Circuit has rejected that interpretation of the history and its effect on the *Chevron* analysis. *See generally San Francisco*, 944 F.3d at 790-99.[4]

In any event, Plaintiffs' disagreement with the Ninth Circuit is irrelevant. That decision controls, and Plaintiffs' contrary-to-law claim should be dismissed.

C. Defendants' Additional Arguments Support Dismissal

Plaintiffs fail to rebut Defendants' two additional arguments why the Rule is consistent with the INA. First, they argue that the battered-alien exception in the INA "refers broadly to 'benefits' and does not single out particular supplemental benefits." Opp'n at 12 (citing 8 U.S.C. §§ 1641; 1182(s)). But section 1641 refers to "federal public benefit[s]," which are defined to include "*any* retirement, welfare, *health*, disability, public or assisted *housing*, postsecondary *education*, *food assistance*, unemployment benefit, or any other similar benefit for which payments *or assistance* are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States." 8 U.S.C. § 1611(c)(1)(B) (emphasis added). Thus, the battered-alien exception clearly applies to the "temporary, supplemental benefits" encompassed within the Rule's definition. Opp'n at 12.

Second, Plaintiffs argue that by passing the affidavit-of-support provision, "Congress expected immigrants to obtain means-tested public benefits after admission" and did not "intend[] to *sub silentio* alter the definition of public charge." Opp'n at 13. But while Congress expected that some immigrants would obtain means-tested public benefits after admission, it likewise intended that *none* of those benefits go unreimbursed, lest the alien become a public charge. Mot. at 10-11 (citing 8 U.S.C. §§ 1182(a)(4)(C)-(D), 1183a(a)(1)(A)). That does not alter, *sub silentio* or otherwise, the definition of "public charge." *San Francisco*, 944 F.3d at 799.

[4] For example, the statistics were cited by the Court on the heels of reiterating *Gegiow*'s interpretation of "public charge." PI Op. at 47-48 ("Deciding otherwise would put this court at odds with persuasive Supreme Court and Ninth Circuit precedent."). But again, the Ninth Circuit has addressed and rejected that reading of *Gegiow*. *See San Francisco*, 944 F.3d at 793-94, 796-97. *Accord Cook Cnty.* 962 F.3d at 224 ("While there is language in *Gegiow* that supports [Plaintiffs'] reading, we are not persuaded that the Supreme Court necessarily ruled so broadly.").

III. Plaintiffs Fail to State a Claim that the Rule is Arbitrary or Capricious

A. Plaintiffs' Arguments Regarding Potential Costs From the Rule Conflict with the Ninth Circuit's Opinion

To support their claim that the Rule is arbitrary and capricious, Plaintiffs rely primarily on this Court's PI Order, Opp'n at 13-14, even though that order was stayed by the Ninth Circuit. Plaintiffs' belief that the Ninth Circuit's opinion "is not controlling," is incorrect for the reasons discussed above. But even if it were not binding, it would at least be persuasive. *See East Bay*, 950 F.3d at 1265 (decision by motions panel is "persuasive" on later merits panel). Just as a "later merits panel should not 'lightly overturn a decision made by a motions panel,'" *id*. at 1262, this Court should not lightly rule contrary to the opinion in *San Francisco*.

Plaintiffs make three points, but none of them would warrant straying from the *San Francisco* opinion even if the Court were authorized to do so. First, Plaintiffs argue that the Supreme Court recently 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." Opp'n at 15 (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (June 18, 2020)). But, as the Ninth Circuit held, DHS did address the costs. And, as the Ninth Circuit explained, the "question is not whether an agency can change a policy that people have come to rely on; clearly, it can. The real question is whether the agency has acknowledged the change and explained the reasons for it." *San Francisco*, 944 F.3d at 804-05 (concluding that "DHS has adequately explained the reasons for the Final Rule"). Moreover, this case does not involve the types of reliance interests at issue in *Regents*, where "DACA recipients have 'enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance' on the DACA program." *Regents*, 140 S. Ct. at 1914. Here, DHS explained that the Rule is not retroactive and that "DHS will not apply the new expanded definition of public benefit to benefits received before the effective date of th[e] final rule." 84 Fed. Reg. 41292, 41321 ("Rule"). In other words, individuals subject to the Rule know, before applying for any public benefits, what might be considered and cannot claim a reliance interest to the contrary.

Second, Plaintiffs fault the Ninth Circuit for noting DHS's statement that DHS could not determine precisely the Rule's disenrollment impact. Opp'n at 15.[5] Plaintiffs, however, have missed the point of the Ninth Circuit's rulings on this issue, which were (1) the potential costs are indirect; (2) DHS did "recognize the overall effect of the Final Rule, and that is sufficient"; and (3) these effects are "well beyond DHS's charge and expertise" such that "[e]ven if it could estimate the costs to the states, localities, and healthcare providers, DHS has a mandate from Congress with respect to admitting aliens to the United States." *San Francisco*, 944 F.3d at 803-04. Plaintiffs' arguments do not address, and fail to refute, these points.

Third, Plaintiffs argue that the Ninth Circuit's analysis of the Rule's impact on public health "was limited to vaccinations." Opp'n at 15. The Ninth Circuit specifically discussed vaccinations because that was a focus of this Court's PI Order, *see* PI Order at 60-62. In any event, the Ninth Circuit discussed at length the costs associated with benefits disenrollment, which overlaps with the public health issue. *San Francisco*, 944 F.3d at 801-04. And its finding that DHS "changed its Final Rule in response to the comments," applies to public health concerns generally. *Id*. at 804. In short, Plaintiffs have not shown any basis to deviate from the Ninth Circuit's opinion, even if this Court were authorized to do so.

Plaintiffs also suggest that this claim cannot be resolved on a motion to dismiss, Opp'n at 14, but that is incorrect. *See R.J. Reynolds*, 130 F. Supp. 3d at 369. Here, there is no dispute about the relevant facts. The dispute in count two centers on issues that can and should be decided by reference to the NPRM and the Rule. For example, in determining whether DHS adequately explained its policy change, the "real question is whether the agency has acknowledged the change and explained the reasons for it," *San Francisco*, 944 F.3d at 805, which can be determined by examining DHS's explanations in the NPRM and the Rule. Likewise, whether DHS adequately considered potential harms from the Rule involves evaluating DHS's explanations in the NPRM and the Rule. *Id*. at 801-04. The NPRM and the Rule, which are cited throughout the Complaint, are integral to the Complaint and can be considered in deciding Defendants' motion to dismiss. In

[5] In the Rule, DHS explained why data limitations made such a determination difficult, but that it had attempted an estimate in its Final Regulatory Impact Analysis. Rule at 41312.

other words, whether styled as a motion to dismiss or a motion for summary judgment, the parties' arguments will be the same. The arguments will pertain to the legal sufficiency of Defendants' explanations as provided in the NPRM and the Rule. Those arguments can and should be resolved now.

To be sure, there are certainly APA cases that require examination of an administrative record to resolve the claims. For example, as Plaintiffs note, an administrative record was necessary to adjudicate the APA claims in *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708 (9th Cir. 2011). That case challenged an agency decision to revoke a certification for one of the plaintiff's products, which would necessarily require an evaluation of the "information" and "data" that the plaintiff submitted about its product. *Id*. at 713. Plaintiffs also cite *Anderson v. McCarthy*, No. 16-00068, 2016 U.S. Dist. LEXIS 63671 (N.D. Cal. May 13, 2016), but that case presented a "factual dispute between the parties — whether the [agency guidance] constituted final agency action" that was "intertwined with the merits[.]" *Id*. at *7 (internal quotation marks omitted). Here, Plaintiffs do not even attempt to show why the administrative record is necessary to evaluate count two.

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

Plaintiffs' additional theories do not plausibly allege that the Rule is arbitrary or capricious. First, DHS is not expanding the public charge inadmissibility provision to cover nonimmigrants who seek to extend their visas or change their statuses. Opp'n at 16; *see* Rule at 41329. Rather, DHS is independently setting a new condition for approval of extension of stay and change of status applications and petitions pursuant to its ample statutory authority to impose such conditions. Although that condition requires such an applicant or petitioner to establish that the nonimmigrant has not received more than 12 months of public benefits within any 36-month period since obtaining the nonimmigrant status, that is manifestly not a public charge inadmissibility determination—which involves a forward-looking prediction about an alien's use of benefits in the future, and which only applies to applicants for visas, admission, and adjustment of status and which imposes other statutory considerations. *See* 8 U.S.C. § 1182(a)(4).

This condition is a reasonable exercise of DHS's authority. *See* Rule at 41329 (citing 8 U.S.C. §§ 1184, 1258). DHS governs "[t]he admission to the United States of any alien as a nonimmigrant." 8 U.S.C. § 1184(a)(1). But DHS's role does not end upon the nonimmigrant's admission; DHS also governs how long, and under what conditions, the nonimmigrant can stay, *id*., or change nonimmigrant statuses, *id*. § 1258. And because it is national policy "that aliens within the Nation's borders not depend on public resources to meet their needs," *id*. § 1601(2)(A) (emphasis added), it is reasonable and consistent with the statute that DHS require, as a condition of obtaining an extension of stay or change of status, evidence that nonimmigrants inside the United States have remained self-sufficient during their stay.

Also, there is certainly nothing irrational about DHS relying on an applicant's credit history or financial liabilities where Congress has expressly required DHS to consider, *inter alia*, the alien's "assets, resources, and financial status." 8 U.S.C. § 1182(a)(4)(B)(IV). Contrary to Plaintiffs' suggestion, Opp'n at 17, DHS also reasonably accounted for the possibility that some aliens will have a thin or nonexistent credit history. The Rule explains that "DHS understands that not everyone has a credit history in the United States and would not consider the lack of a credit report or score as a negative factor." Rule at 41426. As to English language proficiency, Plaintiffs concede that DHS relied on studies in deciding to include that factor in the public charge inadmissibility calculus, but Plaintiffs argue that those studies "pertain to *non*-English speakers as opposed to those who are simply not proficient." Opp'n at 17. That is incorrect. DHS cited evidence indicating that noncitizens who reside in households where English is spoken "[n]ot well" received public benefits at much higher rates than noncitizens residing in households where English was spoken "[w]ell" or "[v]ery well." 83 Fed. Reg. at 51196. Also, Plaintiffs' concern that adjudicators must apply these factors in assessing an applicant's likelihood of becoming a public charge *in the future*, Opp'n at 16, is a criticism of the statute, not the Rule. *See* 8 U.S.C. § 1182(a)(4)(A) ("likely at any time to become a public charge").

Finally, Plaintiffs have abandoned their claims that (1) the Rule's totality of the circumstances test is vague, Mot. at 13-15, and (2) "USCIS and DHS were improperly influenced in their rulemaking process by the political motivations of individuals within the Trump

Administration," *id*. at 16 (quoting Am. Compl. ¶ 200). As to the latter, Plaintiffs argue instead that the Rule is contrary to law because it allegedly was motivated by racism. Opp'n at 17. That argument is addressed below in Section VI in connection with Plaintiffs' equal protection claim.[6]

IV. McAleenan Lawfully Served as Acting Secretary

Plaintiffs have failed to rebut Defendants' showing that Kevin McAleenan lawfully served as Acting Secretary of Homeland Security. Plaintiffs do not contest that, in April 2019, Secretary Nielsen issued an order expressly "[a]mending the Order of Succession in the Department of Homeland Security" in which she stated, "I hereby designate the order of succession for the Secretary of Homeland Security as follows." Decl. of Juliana Blackwell, Ex. 1. Nevertheless, Plaintiffs insist that Secretary Nielsen's order "had no effect on the order of succession when a Secretary resigned[.]" Opp'n at 18. But Secretary Nielsen's order was unqualified, as was the accompanying memorandum that she signed, *see* Blackwell Decl., Ex. 1 at 1 (the subject of the memorandum Secretary Nielsen signed was "Designation of an Order of Succession for the Secretary"); *id.* (the summary of the memorandum explained "you have expressed your desire to designate certain officers of [DHS] in order of succession to serve as Acting Secretary"); *id.* (the action line of the memorandum noted that "[b]y approving the attached document, you will designate your desired order of succession for the [DHS Secretary]"). Thus, Secretary Nielsen's April 2019 order flatly contradicts Plaintiffs' claim that Nielsen did not change the succession order.

Plaintiffs contend that Secretary Nielsen did not change the order of succession that governed when a Secretary resigned. Opp'n at 18. Instead, Plaintiffs say, she only changed the order for delegating the Secretary's authority when the "Secretary was 'unavailable to act during

[6] *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019), cited by Plaintiffs, does not apply here. In that case, the Supreme Court found a "significant mismatch between the decision the Secretary made and the rationale he provided," and the Court determined that remand to the agency was appropriate because the explanation provided was, according to the Court, "more of a distraction." *Id*. at 2575-76. The Complaint does not contain any allegations plausibly suggesting that the justifications for the Rule – promoting self-sufficiency among aliens and discouraging aliens from immigrating to the United States for the purpose of obtaining public benefits – are "contrived reasons." *Id*. at 2575. There is no serious question that the officials involved in the rulemaking genuinely support those objectives.

a disaster or catastrophic emergency,'" which was set out in "Annex A" to a 2016 DHS delegation order (DHS Delegation No. 00106). *Id.* (citation omitted). So, Plaintiffs conclude, when Secretary Nielsen resigned, her April 2019 order did not control the order of succession. *Id.* But this argument ignores that Secretary Nielsen's order, in no uncertain terms, expressly "designate[d] the order of succession for the Secretary of Homeland Security[.]" Blackwell Decl., Ex. 1. As the Secretary of Homeland Security, Nielsen was the only person with the authority to change the order of succession under 6 U.S.C. § 113(g)(2). She exercised that authority by signing the April 9, 2019 memorandum. Thus, her signed order was effective the day she signed it. In fact, the April 9, 2019 signed order would have controlled the order of succession even if DHS Delegation No. 00106 was never updated to reflect the April 9, 2019 change.

There is no reason for the Court to find a conflict between the 2019 order and the earlier DHS Delegation No. 00106 because the order signed by the Secretary under her authority clearly defined the order of succession. Indeed, Plaintiffs' argument relies on the terms of an internal implementing document and, in turn, necessarily assumes that the implementing document supersedes the 2019 order, which it could not possibly do. But, even if the Court were to find a conflict between the 2019 order and the earlier DHS Delegation No. 00106, the 2019 order still would control. In the analogous context of statutory interpretation,[7] it is well-established that "when two statutes conflict, the later-enacted statute controls." *PDS Consultants, Inc. v. United States*, 907 F.3d 1345, 1359 (Fed. Cir. 2018); *Nguyen v. United States*, 556 F.3d 1244, 1253 (11th Cir. 2009). Faced with conflicting statutes, courts consider whether there is evidence "of an intention to repeal" the earlier statute. *See Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1156, 1158 (9th Cir. 2020). Here, as even Plaintiffs appear to acknowledge, the Nielsen order intended to change the order of succession. *See* Opp'n at 18. Accordingly, the Nielsen order must be understood to have repealed any prior order setting a different order of succession. Indeed, it would have made no logical sense for Secretary Nielsen to change the "order of succession for

[7] *See Crowell v. IRS*, 2001 U.S. Dist. LEXIS 2121, at *9 (E.D. Tenn. 2001) ("Administrative orders delegating authority . . . and statutes share enough characteristics to warrant the Court's employing similar rules of construction.").

the Secretary of Homeland Security" only to have an earlier delegation continue to actually govern the order of succession within DHS.

As Plaintiffs note, DHS later revised Section II.A in DHS Delegation No. 00106 when then-Acting Secretary McAleenan made further changes to the order of succession in November 2019. Opp'n at 19. But that change only reinforces the conclusion that the references to Executive Order 13753 in Section II.A were not effective following Secretary Nielsen's order. Acting Secretary McAleenan resolved any potential inconsistency between Secretary Nielsen's April 9, 2020 order and DHS Delegation No. 00106 in favor of Nielsen's order. Acting Secretary McAleenan's action was not "superfluous," Opp'n at 19; rather, it clarified the interaction between the two documents.

V. Cuccinelli Lawfully Served as Acting USCIS Director

Plaintiffs' claims relating to Cuccinelli's service as Acting USCIS Director are similarly meritless. Plaintiffs do not contend that Cuccinelli promulgated the Rule, nor could they. Instead, they argue that his "pre-promulgation involvement likely entailed taking [Federal Vacancies Reform Act ("FVRA")]-defined action" and that they should be allowed "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." Opp'n at 20. The only action challenged in this case is the promulgation of the Rule, and there is no dispute that Cuccinelli did not take that action. To the extent Plaintiffs believe Cuccinelli may have taken some other "FVRA-defined action," they have not alleged what action that may be or how it might be relevant to this case. Accordingly, Plaintiffs have failed to plead a cognizable claim.[8]

Next, Plaintiffs attempt to distinguish between their APA claims and their claims purportedly brought directly under the FVRA. Opp'n at 20. At the outset, the FVRA provides no stand-alone claim in this case. Accordingly, if Plaintiffs' purported-FVRA claims are not brought pursuant to the APA, then they must be dismissed for lack of a cause of action. Furthermore,

[8] Plaintiffs' request to take unspecified discovery is baseless and, in any event, does not show that they have stated a claim. Plaintiffs cite no case authorizing discovery where a plaintiff challenges an official's service under the FVRA.

Plaintiffs misunderstand the law when they argue that "the substantial involvement of an improperly appointed official in promulgating the Rule renders it not 'in accordance with law' under the APA." Opp'n at 20. No law prohibited Cuccinelli from working on the rulemaking, and that is true regardless of whether his service was proper under the FVRA because he remained a lawful employee of the agency regardless of his title and could contribute to the process leading up to the rulemaking. In other words, the FVRA question relates only to whether Cuccinelli was properly serving as Acting USCIS Director, and that is a different question from whether he was lawfully permitted to work on the Rule. Neither the FVRA nor any other law prohibited him from working on the Rule.

Lastly, the court in *L.M.-M. v. Cuccinelli*, 2020 U.S. Dist. LEXIS 35897 (D.D.C. Mar. 1, 2020) did not adopt "this very argument regarding Cuccinelli," as Plaintiffs claim. Opp'n at 20. On the contrary, in *L.M.-M*, "Cuccinelli issued a memorandum announcing a revised policy for scheduling credible-fear interviews in expedited removal proceedings" and the plaintiffs challenged the lawfulness of that policy. *Id*. at *5-7. Here, Plaintiffs are challenging an agency rule that all parties agree was *not* issued by Cuccinelli.

VI. Plaintiffs Fail to State a Claim that the Rule Violates Equal Protection

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

As a threshold matter, Supreme Court "cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Thus, with respect to immigration policy, a highly "deferential standard of review" applies because "it is not the judicial role in cases of this sort to probe and test the justifications of" the executive branch. *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018). "A conventional application of" this

standard asks "only whether the policy is facially legitimate and bona fide." *Id*. at 2420. In response, Plaintiffs argue that *Hawaii*'s narrow standard applies only in the national security context and does not apply to cases involving aliens in the United States. Opp'n at 23-24. That is incorrect. The *Hawaii* decision explained that the deferential standard was appropriate for cases involving "the admission and exclusion of foreign nationals," an area which is "largely immune from judicial control." *Id*. at 2418. There is no question that this case—which challenges DHS's interpretation of the public charge *inadmissibility* provision—directly implicates the federal government's policies regarding the admission of aliens. The fact that an alien seeking adjustment of status may be physically present in the United States is irrelevant because "[i]t is a well established fact that an applicant for adjustment of status under Section 245 of the Act is in the same posture as though he were an applicant before an American consular officer abroad seeking issuance of an immigrant visa for the purpose of gaining admission to the United States as a lawfully permanent resident." *Matter of Harutunian*, 14 I. & N. Dec. 583, 589 (Reg'l Comm'r Feb. 28, 1974). Regardless of an alien's location, DHS determinations under 8 U.S.C. § 1182(a)(4) are determinations about *admissibility*, which is required for applicants seeking adjustment of status under 8 U.S.C. § 1255.[9]

Furthermore, the Supreme Court in *Hawaii* expressly stated that the deferential standard applies "across different contexts and constitutional claims." 138 S. Ct. at 2419. For authority, the Supreme Court cited *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008), a case involving an equal protection challenge brought by aliens *inside* the country. The Court also cited *Fiallo*, a paternity/legitimacy case in which the Court had rejected the same type of reasoning as advanced by Plaintiffs here. *See Fiallo*, 430 U.S. at 796 (rejecting characterization of "prior immigration cases as involving foreign policy matters and congressional choices to exclude or expel groups of

[9] Plaintiffs' belief that the physical location of the alien determines the standard of review cannot be squared with the Supreme Court's explanation that judicial review for admission cases arises in situations where the government action "burdens the constitutional rights of a U.S. citizen," *Hawaii*, 138 S. Ct. at 2419, not based on where the alien may be located. Absent burdens on citizens' constitutional rights, there is no judicial review at all. *Id*. In any event, no aliens are parties to this case, so the location of non-party aliens could not possibly determine the appropriate standard of review for *Plaintiffs'* claims.

aliens that were specifically and clearly perceived to pose a grave threat to the national security . . . or to the general welfare of this country"). And the Supreme Court quoted its prior ruling that "*any* policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power." *Id.* (quoting *Harisiades v. Shaughnessy*, 342 U. S. 580, 588-89 (1952)) (emphasis added).

Plaintiffs fail to state an equal-protection claim under the *Hawaii* standard, or even a less deferential standard. First, Plaintiffs rely largely on generic statements by White House officials which Plaintiffs believe suggest animus. But none of these statements references the Rule. The Supreme Court has recently clarified that "statements . . . remote in time and made in unrelated contexts . . . do not qualify as 'contemporary statements' probative of the decision at issue," and thus "fail to raise a plausible inference that the [the decision] was motivated by animus." *Regents*, 140 S. Ct. at 1916. Thus, Plaintiffs provide no supporting allegation for their assertion that the Rule *in particular* was instituted due to improper animus, rather than the elaborate, non-discriminatory justifications laid out in the Rule's preamble itself (which spans over two-hundred pages).

Additionally, and more fundamentally, the President was not the Rule's "decisionmaker[]." *Id.* at 1910, 1916 (for the equal protection challenge to DACA, "[t]he relevant actors were most directly Acting Secretary Duke and the Attorney General," since Duke made the challenged decision and, under the relevant statute, "she was bound by the Attorney General's legal determination."). Although Plaintiffs claim that the White House (through Stephen Miller) pushed for the Rule, the Rule was ultimately promulgated by the then-Acting Secretary of Homeland Security, and Plaintiffs do not deny that the Acting Secretary ultimately had authority over the implementation of the Rule. Thus, these statements from White House officials do not reveal why DHS enacted the Rule, and thus they do not support an equal protection challenge to the Rule.

Plaintiffs argue that the President initially sought to institute an executive order pertaining to public charge. *See* Opp'n at 22. But Plaintiffs here are challenging the DHS public charge rule, not a hypothetical public charge executive order that never went into effect. Thus, Plaintiffs must show that *DHS* instituted the Rule due to discriminatory animus. Plaintiffs also argue that their

allegations concerning the supposed improper appointments of McAleenan and Cuccinelli buttress their equal protection claim. *See* Opp'n at 23. But Plaintiffs provide no explanation for how these allegations suggest that the relevant decision-maker—or anyone else, for that matter—supported the Rule due to any discriminatory animus. Accordingly, Plaintiffs have failed to state a plausible equal protection claim.

VII. The President Is Not a Proper Defendant

Although Plaintiffs contend that "courts routinely issue and uphold relief enjoining the official actions of a sitting President," they cite no actual examples of this supposed "widespread practice" in civil litigation. Opp'n at 24. *Boumediene v. Bush*, 553 U.S. 723 (2008) and *East Bay*, 950 F.3d 1242, cited by Plaintiffs, did not order relief against a president and those decisions say nothing at all about when such relief may be ordered. *United States v. Nixon*, 418 U.S. 683 (1974) held only that the President may be subject to a subpoena to provide information relevant to an ongoing criminal prosecution. Indeed, the Court in *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) distinguished *Nixon*'s criminal law context from the "general" rule that courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." The *Franklin* court also explained that a "grant of injunctive relief against the President himself is extraordinary," *id.*, flatly contradicting Plaintiffs' bald assertion that it is a "widespread practice."[10] In short, Plaintiffs have not provided any basis to bring their claims against the President, and those claims should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Amended Complaint.[11]

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[10] *See also International Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017), vacated as moot, 138 S. Ct. 353 (2017) ("In light of the Supreme Court's clear warning that such relief should be ordered only in the rarest of circumstances . . . the district court erred in issuing an injunction against the President himself."); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief[.]" (citations omitted)).

[11] On July 23, Defendants filed an administrative motion to exceed by four pages the page limitation applicable to this reply. *See* ECF No. 171. If the Court does not grant that motion, Defendants respectfully request an opportunity to submit a revised version of this reply that is no more than 15 pages.

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