IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

PLAINTIFFS' CONSOLIDATED MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' CONSOLIDATED MOTION TO DISMISS

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INTRODUCTION

The Public Charge Rule, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (codified at 8 C.F.R. pts. 103, 212–14, 245, 248), unlawfully expands the Department of Homeland Security (DHS)'s power to deny noncitizens a pathway to remain lawfully in the United States. As this Court previously recognized in granting a preliminary injunction in the *CASA* case, DHS's Rule departs from over a century of consistently narrow interpretation of the public-charge inadmissibility ground and contravenes both the Immigration and Nationality Act (INA) and binding Board of Immigration Appeals (BIA) precedent. Because the Rule treats Supplemental Nutrition Assistance Program (SNAP) benefits as income or resources, the Rule also violates the SNAP statute. DHS also adopted the Rule in an arbitrary and capricious manner by: (1) failing to justify adequately its departure from its prior interpretation of the public-charge provision; (2) insufficiently addressing the Rule's harms; (3) failing to address adequately public comments about the Rule's impact on taxpayers, its consideration of credit reports and scores, and its vagueness and disparate impact; and (4) adopting features that are not a logical outgrowth of its proposed rule (NPRM). The Rule also violates the U.S. Constitution because it is impermissibly vague and was motivated by animus toward non-European and nonwhite immigrants.

Advancing the same erroneous position that they have taken in similar cases around the country, Defendants cannot identify a single litigant among Plaintiffs that, in Defendants' view, has Article III standing or a statutory cause of action to challenge the Public Charge Rule. Defendants also wrongly contend that none of Plaintiffs' claims is ripe for adjudication. Plaintiffs have standing because the Rule has discouraged individuals from accepting public benefits to which they are entitled, a chilling effect that the Organization and Government Plaintiffs[1] are

[1] Plaintiffs adopt Defendants' categorization of Plaintiffs. Mot. 6 & nn. 3–4.

compelled to counteract because of their missions and duty to their constituents, respectively. The Rule's vagueness also forces Individual Plaintiffs and CASA's other members to make difficult financial, employment, educational, medical, and personal decisions *now* to guard against the risk of future unfavorable public-charge determinations. Plaintiffs' claims are therefore justiciable.

Defendants also contend that Plaintiffs have failed to plausibly allege any viable claims. But Plaintiffs' Complaints set forth well-pleaded claims under the Administrative Procedure Act (APA) and the Constitution. Accordingly, Defendants' Motion to Dismiss should be denied.

PROCEDURAL HISTORY

The Court's Memorandum Opinion and Order granting a preliminary injunction in the *CASA* case sets forth the relevant factual and legal background, which Plaintiffs incorporate by reference. Mem. Op. & Order 2–6, ECF No. 65 (hereinafter "PI Op.").[2] *CASA* Plaintiffs[3] filed their suit and a motion for a preliminary injunction on September 16, 2019. *Gaithersburg* Plaintiffs filed suit 11 days later, but did not seek preliminary relief. This Court granted *CASA* Plaintiffs' motion on October 14, 2019, holding that Plaintiff CASA de Maryland, Inc. (CASA) has organizational standing and that Plaintiffs were likely to succeed on the merits of their claim under 5 U.S.C. § 706(2)(A) that DHS's Public Charge Rule is "not in accordance with law." PI Op. 14, 32. The Court did not rule on *CASA* Plaintiffs' other standing theories or claims. *Id.* at 14, 32–33. Defendants appealed and sought a stay of the preliminary injunction. On December 9, 2019, a Fourth Circuit motions panel stayed this Court's preliminary injunction in an unpublished order issued without an opinion.[4] Order, *CASA de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir. Dec.

[2] Except where otherwise indicated, ECF numbers throughout refer to the *CASA* docket.

[3] The Mayor and City Council of Baltimore was initially part of the *Gaithersburg* case, but joined the *CASA* case when the operative Complaints were filed on January 3, 2020.

[4] Higher courts have stayed the other preliminary injunctions issued by the district courts that have reviewed the legality of the Public Charge Rule. *See DHS v. New York*, 140 S. Ct. 599 (2020)

9, 2019). The Fourth Circuit heard oral argument on May 8, 2020, but has yet to issue an opinion.[5]

Defendants now move to dismiss the *CASA* Second Amended Complaint, ECF No. 93 (hereinafter "*CASA* Compl."), and the *Gaithersburg* First Amended Complaint, No. 8:19-cv-2851-PWG, ECF No. 41 (hereinafter "*Gaithersburg* Compl."), in their entirety.

LEGAL STANDARD

Defendants challenge Plaintiffs' standing and the ripeness of their claims. Such arguments raise "question[s] of subject matter jurisdiction." *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019). Although Defendants invoke Rule 12(b)(6) of the Federal Rules of Civil Procedure, Rule 12(b)(1) is the proper vehicle. Defendants also move for dismissal under Rule 12(b)(6), arguing that Plaintiffs "fail[] to state a claim for which relief can be granted." Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion must be denied if the complaint states "a plausible claim for relief." *Iqbal v. Ashcroft*, 556 U.S. 662, 679 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678.

For a 12(b)(1) or 12(b)(6) motion, the Court must "accept a plaintiff's allegations of material facts as true and construe the complaint in the plaintiff's favor." *Malkani v. Clark Consulting, Inc.*, 727 F. Supp. 2d 444, 447 n.2 (D. Md. 2010). The Court may take judicial notice of "fact[s] that [are] not subject to reasonable dispute" because they "can be accurately and readily

(mem.); *Wolf v. Cook County (Cook County II)*, 140 S. Ct. 681 (2020) (mem.); *City & County of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). Accordingly, the Rule took effect on February 24, 2020. *See Public Charge*, U.S. Customs & Immigr. Services, https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge (last visited June 23, 2020).

[5] The Seventh Circuit recently affirmed the Northern District of Illinois's preliminary injunction of the Rule. *Cook County v. Wolf (Cook County IV)*, --- F.3d ---, No. 19-3169, 2020 WL 3072046 (7th Cir. June 10, 2020).

determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). In addition, the Court may "consider documents that are explicitly incorporated into the complaint by reference." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016). For the purposes of a 12(b)(1) motion, the Court may also "consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

A. Plaintiffs Have Standing

Defendants contend that not a single Government, Organization, or Individual Plaintiff has Article III standing to challenge the Public Charge Rule. Mot. 6. Each does.

First, "[m]unicipalities generally have standing to challenge laws that result (or immediately threaten to result) in substantial financial burdens and other concrete harms." *Cook County IV*, 2020 WL 3072046, at *4; *accord City & County of San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1121–26 (N.D. Cal. 2019); *New York v. DHS*, 408 F. Supp. 3d 334, 343–44 (S.D.N.Y. 2019); *Mayor & City Council of Baltimore v. Trump*, 416 F. Supp. 3d 452, 489 (D. Md. 2019). As explained in greater detail in the respective complaints, Government Plaintiffs have suffered direct and concrete injuries because the Rule has caused their noncitizen residents to forgo public benefits. Because of the Rule's chilling effect, Government Plaintiffs are experiencing (or imminently will experience): (1) increased noncitizen reliance on municipal services such as food banks and local healthcare services, and reduced reimbursements from Medicaid, *CASA* Compl. ¶¶ 139–42; *Gaithersburg* Compl. ¶¶ 9, 11; *see also* 84 Fed. Reg. at 41,384 (recognizing the "potential for increases in uncompensated care"); (2) greater difficulty and cost combatting the

threat of communicable diseases, *CASA* Compl. ¶¶ 142–45; *Gaithersburg* Compl. ¶ 9; (3) reduced funding for public schools and school-lunch programs, *CASA* Compl. ¶¶ 137–38; (4) diversion of municipal resources toward public education to combat the chilling effect, *CASA* Compl. ¶¶ 146–47; *Gaithersburg* Compl. ¶ 8; and (5) declining public health, stability, and productivity, *CASA* Compl. ¶ 136; *Gaithersburg* Compl. ¶¶ 9, 11. *Cf. Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110–11 (1979) (municipality had standing to sue where racial steering threatened to diminish its tax base, reducing its ability to provide services and undermining social stability).

Defendants contend that these sorts of harms are too speculative because it is unknown whether Government Plaintiffs will "suffer a net increase in public benefit expenditures." Mot. 7. But the Rule itself acknowledges that a significant number of noncitizens and their families will forgo federal benefits. *See* 84 Fed. Reg. at 41,300. Finding the Defendants' contrary argument "disingenuous," the Ninth Circuit concluded that the resulting increase in demand for municipal services is the "'predictable effect of Government action on the decisions of third parties' [that] is sufficient to establish injury in fact," *San Francisco*, 944 F.3d at 787 (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019)). Defendants also claim that the Government Plaintiffs may actually "save" money from their residents deciding to forgo local benefits. Mot. 7. That contention strains logic and cannot be sustained in the face of Plaintiffs' well-pleaded allegations discussed above, which include costs that flow from the Rule's chilling effect, above and beyond increased expenditures on public benefits.[6]

Next, Organization Plaintiffs have sufficiently alleged both organizational and

[6] Contrary to Defendants' assertions, Mot. 7 n.5, the Government Plaintiffs also have third-party standing to assert void-for-vagueness and equal-protection claims on behalf of their residents. *See Baltimore*, 416 F. Supp. 3d at 490 (finding a close relationship between Baltimore and its noncitizen residents based on the municipality's provision of social services and "significant obstacles" to individual challenges because of "credible fear that suing the federal government would torpedo" applications for discretionary immigration benefits, like adjustment of status).

representational standing. Each Organization Plaintiff has met the prerequisites for organizational standing by alleging that the Public Charge Rule has "perceptibly impaired" its efforts to achieve its mission, thereby requiring it to "devote significant resources to identify and counteract" the effects of the Rule and satisfying Article III's injury-in-fact requirement. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (internal quotation marks omitted); *see also Cook County IV*, 2020 WL 3072046, at *4–5; *Make the Rd. N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647, 657–58 (S.D.N.Y. 2019). The Court already has concluded that CASA has organizational standing because the Rule has impaired its mission to empower and improve the quality of life of low-income immigrant communities, causing CASA to devote additional resources to providing public education and counseling individual members about the effects of the Rule on their and their family members' immigration status. Moreover, CASA has had to divert resources from affirmative health care advocacy and other programs to counteract the Rule's harms on its members. PI Op. 10–11; *CASA* Compl. ¶¶ 126–31. The Rule has similarly frustrated the missions of *Gaithersburg* Plaintiffs Friends of Immigrants (FOI), Immigrant Law Center of Minnesota (ILCM), and Tzedek DC, leading each organization to divert scarce resources. *Gaithersburg* Compl. ¶¶ 12–13 (FOI); *id.* ¶¶ 14–19 (ILCM); *id.* ¶¶ 28–29 (Tzedek DC). *Gaithersburg* Plaintiffs Jewish Council for Public Affairs and Jewish Community Relations Council of Greater Washington have standing on behalf of their member organizations, which have standing in their own right because of the increased expenditures they will face as noncitizens forgo public benefits and instead rely on the social services, counseling, and legal services these organizations provide. *Id.* ¶¶ 20–27; *see also N.Y. State Club Ass'n v. New York City*, 487 U.S. 1, 9 (1988) ("consortium has standing to sue on behalf of its member associations as long as those associations would have standing").

In the face of these clearly alleged harms, Defendants rely on *Lane v. Holder*, 703 F.3d 668

(4th Cir. 2012), to argue that Organization Plaintiffs' injuries are mere budgetary choices. Mot. 8–9. But, as the Court previously recognized, this argument is "too clever by half." PI Op. 13. In sharp contrast to the bare-bones allegations found insufficient in *Lane*,

> the only reason for [Organization Plaintiffs'] reallocation of resources is that DHS has adopted a definition of the public charge [provision] that is dramatically more threatening to [the noncitizens they serve], and, in response, [they] ha[ve] had to divert resources that otherwise would have been expended to improve the lives of [noncitizens] in ways unrelated to the issues raised by the public charge inquiry.

Id. If Organization Plaintiffs took no responsive action to the Public Charge Rule, many of their members and constituents would fall victim to the Rule's chilling effect or take actions that could jeopardize their ability to adjust status. Organization Plaintiffs' diversion of resources therefore reflects efforts to minimize the frustration of their missions, not "mere expense[s]" voluntarily incurred. *Lane*, 703 F.3d at 675; *see also Fair Emp. Council of Greater Wash., Inc. v. BMC Mktg. Corp*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (applying *Havens* to similar harms).

CASA also has representational standing on behalf of its members. *See* PI Reply 7, ECF No. 59. In addition to Plaintiffs Aguiluz and Camacho, CASA has other members whose pathway to obtaining adjustment of status is encumbered by the Public Charge Rule, including some who are married to U.S. citizens and currently are eligible to adjust status. *CASA* Compl. ¶ 132. These members exhibit some negative factors under the Rule, such as a household income below 125 percent of the federal poverty guidelines or chronic health conditions and no private health insurance, making them hesitant to apply for adjustment of status.[7] *Id*. These individuals, like Plaintiffs Aguiluz and Camacho, would have standing to challenge the Public Charge Rule. Thus, CASA has representational standing to mount such a challenge on their behalf. *See* PI Reply 1–5.

[7] These individual members are not identified by name for fear of retaliation, *CASA* Compl. ¶ 132 & n.63, but their characteristics are sufficiently identified to determine their standing.

B. Plaintiffs' Claims Are Ripe

"To determine whether the case is ripe, [courts] 'balance the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration.'" *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006) (quoting *Franks v. Ross*, 313 F.3d 184, 194 (4th Cir. 2002)). This Court's reasons for holding CASA's claims are ripe for review, PI Op. 14–16, apply equally to the other Plaintiffs. The case is "fit for judicial review" because "it presents purely legal questions," and the Public Charge Rule is final agency action (and has now gone into effect). *Id.* at 15. As noted, Plaintiffs are "already experiencing harms" because of the Rule; Plaintiffs would suffer significant hardship if the Court withheld consideration of their claims. *Id.*; *accord New York*, 408 F. Supp. 3d at 344; *Baltimore*, 416 F. Supp. 3d at 493.

C. Plaintiffs Fall Within the Zone of Interests

Defendants contend that *no* Plaintiff falls within the zone of interests of the INA's public-charge inadmissibility ground. Mot. 9. But the zone-of-interests test "is not meant to be especially demanding," especially under the APA, through which Congress sought "to make agency action presumptively reviewable." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). "The test forecloses suit only when a 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.'" *Id.* (quoting *Clarke*, 479 U.S. at 399). The Court already has concluded that CASA is within the zone of interests of the public-charge provision, PI Op. 16–18, and should reach the same conclusion for all Plaintiffs.

Courts have uniformly held that municipalities fall within the zone of interests of the public-charge provision. *See Cook County IV*, 2020 WL 3072046, at *5–6; *San Francisco*, 408 F.

Supp. 3d at 1116–17; *New York*, 408 F. Supp. 3d at 345; *see also Baltimore*, 416 F. Supp. 3d at 498–99. In enacting the statute, Congress "intended to protect states and their political subdivisions' coffers," as well as the federal fisc. *San Francisco*, 408 F. Supp. 3d at 1117 (citing 8 U.S.C. § 1183a, which applies to public benefits provided by municipalities); *see also Cook County IV*, 2020 WL 3072046, at *5 ("DHS admits that one purpose of the public-charge provision is to protect taxpayer resources. In large measure, that is the same interest Cook County asserts."). Government Plaintiffs will have to provide additional public services to residents chilled from participating in federal benefits and "will have to suffer the adverse effects of a substantial population with inadequate medical care, housing, and nutrition." *Id.*; *see also Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1304 (2017) (concluding that Miami fell within the Fair Housing Act's zone of interests where predatory loan practices "hindered the City's efforts to create integrated, stable neighborhoods," reduced "property-tax revenue," and increased "demand for municipal services").

With respect to Organization Plaintiffs, as this Court has explained, the INA's public-charge provision regulates "the health and economic status of immigrants granted admission to the United States." PI Op. 17. The INA's admissibility provisions ensure that noncitizens who meet the statute's requirements can enter the United States and, if eligible, apply for LPR status. As is true for CASA, the interests of *Gaithersburg* Organization Plaintiffs fall "squarely within the bounds" of those statutory interests. PI Op. 18; *see also Make the Rd. N.Y.*, 419 F. Supp. 3d at 659 (reaching the same conclusion as to a similar organization). As the complaints detail further, these organizations provide a variety of services and advocacy support to noncitizens in order to foster their health and economic sustainability and maintain their opportunities to adjust status. *See CASA* Compl. ¶¶ 14–16, 126–31; *Gaithersburg* Compl. ¶¶ 12–29. These interests are consistent

with and more than "marginally related to" the purposes of the public-charge inadmissibility provision and are therefore at least "arguably" within the zone of interests of the statute. *Patchak*, 567 U.S. at 225. As immigrant-rights organizations that assist noncitizens in adjusting status, Plaintiffs CASA, FOI, and ILCM are especially "reasonable—indeed, predictable—challengers." *Id.* at 227; *see also* 84 Fed. Reg. at 41,301 (noting that "immigration advocacy groups . . . may need or want to become familiar with the provisions of this final rule").

Finally, Individual Plaintiffs fall within the relevant zone of interests because they are directly regulated by the Public Charge Rule. *See* PI Reply 9.

II. THE RULE IS CONTRARY TO LAW

A. The Rule is Contrary to the INA and Binding BIA Precedent

In preliminarily enjoining DHS's Public Charge Rule, the Court correctly held that Plaintiffs are likely to succeed on the merits of their claim that the Rule is "not in accordance with law" in violation of 5 U.S.C. § 706(2)(A). The Court therefore necessarily recognized the plausibility of that claim. PI Op. 22. Neither the subsequent developments in this case or other cases challenging DHS's Rule, nor the additional arguments raised by Defendants in support of their Motion to Dismiss, call into question the plausibility of Plaintiffs' contrary-to-law claims.[8]

The Court's evaluation of Plaintiffs' contrary-to-law claims aligns with that of the only higher court that has examined the Public Charge Rule's legality with the benefit of full briefing and oral argument. The Seventh Circuit concluded that the Rule "does violence to the English language" and to the "statutory context" of the public-charge provision by defining "public charge"

[8] This Court properly held that the Public Charge Rule fails both Steps One and Two of the *Chevron* framework because it is "'unambiguously foreclosed' by Congress's intention" and "is outside the bounds of any ambiguity" inherent in public-charge provision. PI Op. 32. The Rule also fails *Chevron* Step Two because of the many ways in which it is arbitrary and capricious. *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005); *see also infra* Pt. III.

to "cover[] a person who receives only *de minimis* benefits for a *de minimis* period of time." *Cook County IV*, 2020 WL 3072046, at *13. Accordingly, the court held that the Rule exceeds the "floor inherent in the words 'public charge,' backed up by the weight of history." *Id.*

Defendants argue that the Ninth Circuit's decision staying preliminary injunctions issued by the Northern District of California and the Eastern District of Washington should dispose of Plaintiffs' contrary-to-law claim. Mot. 10–11 (citing *San Francisco*, 944 F.3d 773).[9] But the Ninth Circuit agreed with this Court, PI Op. 24, that, when Congress simultaneously enacted the public-charge inadmissibility ground in 1882 and created an "immigrant fund" to provide public assistance to arriving immigrants, it "did not consider an alien a 'public charge' if the alien received merely some form of public assistance," *San Francisco*, 944 F.3d at 793. Rather, Congress intended the public-charge provision to apply only to noncitizens who are "unable or unwilling to care for themselves," which, in 1882, "meant that they were housed in a government or charitable institution, such as an almshouse, asylum or penitentiary." *Id.*

Contrary to this Court's analysis, the Ninth Circuit erroneously interpreted *Matter of B-*, 3 I. & N. Dec. 323 (BIA & AG 1948), as adopting a "new definition of 'public charge'" permitting the exclusion of noncitizens based on a prediction that they might receive a de minimis amount of public assistance on a temporary basis. *San Francisco*, 944 F.3d at 795. But *Matter of B-* held that a noncitizen institutionalized for mental-health treatment was *not* deportable on public-charge grounds because applicable state law did not make her financially responsible for the "maintenance, care, and treatment" she had received at public expense. *Matter of B-*, 3 I. & N.

[9] Neither the Fourth Circuit nor the Supreme Court issued written opinions, so the basis on which their stays were granted is unknown. *New York*, 140 S. Ct. 599; *Cook County II*, 140 S. Ct. 681; Order, *CASA*, No. 19-2222 (4th Cir. Dec. 9, 2019). Justice Sotomayor added in dissent that it is "far from certain" that five justices ultimately would agree with the Government's position on the merits. *Cook County II*, 140 S. Ct. at 683 (Sotomayor, J., dissenting).

Dec. at 327. Although the decision mentions that the noncitizen's sister covered the cost of her "clothing, transportation, and other incidental expenses," for which she was financially liable under state law, it in no way suggests that the noncitizen could have been deported on public-charge grounds for failure to pay for those incidental expenses. *Id.* Any ambiguity concerning whether *Matter of B-* adopted such an expansive definition of "public charge" is resolved decisively in the negative by the Immigration and Nationality Service (INS)'s own publications reflecting its contemporaneous understanding of the public-charge inadmissibility and deportability grounds[10] and by subsequent BIA precedent still binding on DHS today.[11] *See* 8 C.F.R. § 1003.1(g)(1).

Defendants also argue that other INA provisions support DHS's interpretation of "public charge." They point first to a provision that prohibits immigration officials from considering in public-charge determinations past receipt of certain benefits by victims of domestic violence, arguing that the exemption implies that consideration of such benefits is ordinarily permissible. Mot. 11 (citing 8 U.S.C. § 1182(s)). But DHS's Rule is contrary to law not because it considers noncitizens' *past* receipt of benefits—something relevant only rarely, if ever, given the restrictions

[10] Ex. A (Apr. 1950 *INS Monthly Review* Article) (INS Commissioner finding that all 80 individuals deported on public-charge grounds in prior 3.5 years had been institutionalized, with "poor" prospects of recovery in the majority of cases); Ex. B (Mar. 1949 *INS Monthly Review* Article) ("It is wrong to assume that poverty alone will disqualify an immigrant. . . . Generally, the likelihood of becoming a public charge is associated with mental or physical deficiencies but this is not invariably true. Destitution or even possession of limited means, coupled with inability to work, may be sufficient to bar entry."). Defendants have produced these articles to Plaintiffs as part of the Administrative Record, and the Court may take judicial notice of them. *See In re Human Genome Sciences Inc. Sec. Litig.*, 933 F. Supp. 2d 751, 758 (D. Md. 2013).

[11] *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974) (holding that a noncitizen was not likely to become a public charge, despite being having received welfare benefits "for some time," because she was "28 years old, in good health, and capable of finding employment"); *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (AG 1964) ("A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge . . . .").

on non-LPR benefits receipt—but because it denies admission and LPR status to noncitizens based on a prediction about whether they will, *in the future*, accept a small amount of public benefits.

Next, Defendants argue that the INA's affidavit-of-support requirement implies that Congress intended to exclude noncitizens based on "the mere *possibility* that [they] might obtain unreimbursed, means-tested public benefits in the future." Mot. 12. That is wrong in several respects. First, DHS itself noted that an unfavorable public-charge determination involves "more than a showing of a possibility that the alien will require public support." 2018 NPRM, 83 Fed. Reg. 51,114, 51,125 (Oct. 10, 2018) (quoting *Martinez-Lopez*, 10 I. & N. Dec. at 421). Second, the affidavit-of-support requirement applies only to a limited subset of noncitizens (e.g., it does not apply to most employment-based applicants for LPR status or diversity-lottery winners), whereas the public-charge provision applies more broadly. *See* 8 U.S.C. § 1182(a)(4)(C), (D). Third, affidavits of support are enforceable for only a limited period of time, *id.* § 1183a(a)(3)(A), whereas the public-charge provision has an unlimited time-horizon, *id.* § 1182(a)(4). Fourth, by codifying requirements for affidavits of support in 1996, Congress did not intend to make adjusting status more difficult, as DHS's Rule does, but rather to make affidavits legally enforceable. Congress made this change because any reasonable interpretation of the public-charge provision would not exclude noncitizens who are likely to be eligible for and to potentially accept modest (but noncomprehensive) amounts of public assistance in the future.[12] Finally, when it enacted the affidavit-of-support provisions, Congress considered and *rejected* a proposed statutory definition of "public charge" similar to the one DHS has adopted. PI Op. 29–30. An intent to accomplish

[12] *See* H.R. Rep. No. 104-725, at 387–88 (1996) (Conf. Rep.) ("[A] prospective permanent resident alien . . . who otherwise would be excluded as a public charge . . . [is able] to overcome exclusion through an affidavit of support . . . ."); S. Rep. No. 104-249, at 6 (1996) ("One of the ways immigrants are permitted to show that they are not likely to become a public charge is by providing an affidavit of support . . . .").

implicitly what Congress explicitly declined to do cannot be inferred from the INA's affidavit-of-support provisions. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987).

B. The Rule Is Contrary to the SNAP Statute

Federal law prohibits the "value" of SNAP benefits from being "considered income or resources for any purpose" by any government entity. 7 U.S.C. § 2017(b). The Public Charge Rule violates that prohibition. Notwithstanding DHS's representations to the contrary in the Rule's preamble, Mot. 13 (citing 84 Fed. Reg. at 41,375), the Rule authorizes immigration officials to consider noncitizens' past application or certification for or receipt of SNAP benefits as evidence that their "assets, resources, and financial status" weigh in favor of or against exclusion of noncitizens on public-charge grounds. 8 C.F.R. § 212.22(b)(4)(ii)(E). Moreover, the Rule renders noncitizens inadmissible based on the likelihood that they might receive SNAP benefits in the future. *Id.* § 212.21(a), (b)(2), (c). The Rule therefore requires immigration officials to unlawfully take into account the possibility that noncitizens might one day receive SNAP benefits at a "value" other than zero. Defendants analogize the Rule's treatment of SNAP benefits to 47 C.F.R. § 54.409. Mot. 13. But that regulation, unlike this one, does not treat SNAP benefits as income or resources; rather, it allows SNAP beneficiaries to qualify automatically for another benefit with income-eligibility requirements slightly higher than SNAP's.

Accordingly, Plaintiffs have plausibly alleged that the Public Charge Rule is contrary to the INA and binding BIA precedent, as well as the SNAP statute.

III. PLAINTIFFS ADEQUATELY ALLEGE THAT DHS ACTED ARBITRARILY AND CAPRICIOUSLY IN ADOPTING THE RULE

A. DHS Did Not Provide a Reasoned Explanation for Its Rejection of the Longstanding Interpretation of the Public-Charge Provision

In rejecting the longstanding interpretation of the public-charge provision, Defendants

agree that DHS was obligated to (1) "acknowledge that the Rule is adopting a policy change"; (2) "provide a reasoned explanation for the change"; and (3) "explain how it believes the new interpretation is reasonable." Mot. 14 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009)). Plaintiffs allege that DHS failed to meet the final two of those obligations. *CASA* Compl. ¶¶ 157–60; *Gaithersburg* Compl. ¶¶ 2, 104–13.

DHS did not provide a reasoned explanation for departing from the longstanding interpretation of "public charge." According to DHS, the settled interpretation was untenable because it did not ensure that noncitizens would be "self-sufficient" at all times—a term DHS now defines to exclude a "person with limited means" who uses public benefits to "satisfy basic living needs," "even in a relatively small amount or for a relatively short duration." 83 Fed. Reg. at 51,164. This explanation does not render DHS's decision reasonable because the term "self-sufficient" appears nowhere in the public-charge provision. *See Liu v. Mund*, 686 F.3d 418, 422 (7th Cir. 2012) ("[S]elf-sufficiency. . . is not the goal stated in the [public-charge] statute; the stated statutory goal . . . is to prevent the admission to the United States of any alien who 'is likely at any time to become a public charge.'"). And few could meet DHS's sky-high bar for self-sufficiency in modern society, where "[s]ubsidies abound." *Cook County IV*, 2020 WL 3072046, at *6.[13]

DHS's explanation for its new interpretation of "public charge" is also irrational. An agency must provide a "satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). DHS failed to justify a definition of "public charge" that denies admission and adjustment of status to noncitizens whose predicted receipt of

[13] *See also CASA* Compl. ¶ 72 (citing Danilo Trisi, Ctr. on Budget & Policy Priorities, *Trump Administration's Overbroad Public Charge Definition Could Deny Those Without Substantial Means a Chance to Come to or Stay in the U.S.* (2019), https://perma.cc/4J72-GF6P).

public benefits would constitute only a fraction of their income and resources.

The Public Charge Rule denies admission or adjustment of status to noncitizens if they are deemed likely to "receive[] one or more" of an enumerated set of public benefits including SNAP, Medicaid, and federal housing benefits "for more than 12 months in the aggregate within any 36-month period," with multiple benefits received in a single month counting as multiple months of benefits (the 12/36 standard). 8 C.F.R. § 212.21(a), (b). The minimum monthly SNAP benefit is $16.[14] Therefore, a noncitizen could be inadmissible on public-charge grounds based on a prediction that she is likely to receive as little as $192 in SNAP benefits in any three-year period for the rest of "eternity." *Cook County IV*, 2020 WL 3072046, at *16. Assuming that this hypothetical noncitizen was earning the maximum allowable income for SNAP, that amount of benefits would be equal to only 0.4 percent of her total income over that three-year period.[15] DHS's adoption of such a de minimis definition of "public charge" is arbitrary and capricious.

Defendants maintain that aggregate public expenditures on SNAP, Medicaid, and federal housing benefits support this massive change in immigration policy. Mot. 14–15 (citing 83 Fed. Reg. at 51,160–64). But aggregate expenditure data shed no light on the degree to which individual recipients rely on those benefits. Moreover, SNAP, Medicaid, and federal housing benefits are all supplemental benefits meant to *enhance* recipients' well-being, not ensure their subsistence.[16]

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[14] U.S. Dep't of Agric., *Supplemental Nutrition Assistance Program (SNAP Fiscal Year (FY) 2020 Minimum Allotments* (Oct. 11, 2019), https://perma.cc/4CEL-UKUU.

[15] An individual earning income at 130 percent of the Federal Poverty Guidelines for 2020 would earn $49,764 over three years. Annual Update of the HHS Poverty Guidelines, 85 Fed. Reg. 3,060, 3,060 (Jan. 17, 2020); *see also CASA* Compl. ¶ 74 (an individual receiving an average SNAP benefit would receive about $1,500 in SNAP benefits over 12 months).

[16] *See* 7 U.S.C. § 2011 (SNAP's purpose is to help "low-income households obtain a *more nutritious* diet" and to "*increase*[] food purchasing power" (emphasis added)); 42 U.S.C. § 1437f (Section 8 vouchers' purpose is to "aid[] low-income families in obtaining a *decent* place to live" and to "promot[e] economically mixed housing" (emphasis added)); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 556 (2012) (suggesting that health insurance is not a necessity for young,

There is simply no rational connection between aggregate spending on those programs and DHS's conclusion that individual program beneficiaries are not self-sufficient.

DHS's unsatisfactory explanation for the 12/36 standard is particularly inadequate here because its policy "rests upon factual findings that contradict those that underlay its prior policy." *Fox*, 556 U.S. at 515. In such instances, the agency is obligated to "provide a more detailed justification" than required for a new rule. *Id.* Based on consultations with benefit-granting agencies, INS previously found that "it is extremely unlikely that an individual or family could subsist on a combination of non-cash benefits or services." *CASA* Compl. ¶ 62; 1999 NPRM, 64 Fed. Reg. at 28,678 (internal quotation marks omitted); *see also Gaithersburg* Compl. ¶¶ 107–09.[17] Relying on those findings, INS's 1999 Field Guidance provided that it would not consider non-cash benefits like SNAP, Medicaid, and federal housing benefits (outside of institutionalization for long-term care at public expense) in public-charge determinations. DHS has provided no explanation, let alone a detailed one, for why INS's factual findings were incorrect in 1999 or what other factual considerations led it to draw a different conclusion about basing public-charge determinations on predictions about whether noncitizens are likely—in the future—to receive supplemental, non-cash benefits.[18] *See Fox*, 556 U.S. at 537 (Kennedy, J., concurring)

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healthy individuals who might rationally forgo health insurance because they are "less likely to need significant health care and have other priorities for spending their money").

[17] *See also* Letter from Kevin Thurm, Deputy Sec'y, U.S. Dep't of Health & Human Servs., to Doris Meissner, Comm'r, INS (Mar. 25, 1999), *reprinted at* 64 Fed. Reg. at 28,686 (stating that 82 percent of families receiving TANF in 1997 earned no income, whereas "virtually all families receiving non-cash support benefits, *but not receiving cash assistance*, must rely on other income (usually earned income) in order to meet their subsistence needs").

[18] Interagency communications cited but not disclosed by DHS are likely to provide highly probative information regarding the arbitrariness of DHS's decision to depart from the longstanding definition of "public charge." *CASA* Compl. ¶ 84. Defendants assert that there is "no requirement under the APA" that they disclose the contents of such consultations. Mot. 21. But Defendants cannot meet their obligation to "provide a more detailed justification" without explaining how, if at all, the information DHS received from the benefit-granting agencies differed

("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.").

B. DHS Did Not Adequately Address the Rule's Harms

Defendants disavow any obligation to consider the Public Charge Rule's adverse effects by stating that Executive Orders governing agencies' use of cost-benefit analysis "cannot give rise to a cause of action under the APA." Mot. 15 (internal quotation marks omitted). But "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). The concept of cost encompasses "any disadvantage" of a regulation, not just fiscal considerations or harms that fall within DHS's regulatory mandate. *Id.* And when, as here, "an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012). An agency must also consider "serious reliance interests" when, as here, it departs from a longstanding policy. *DHS v. Regents of the Univ. of Cal.*, --- S. Ct. ---, No. 18-587, 2020 WL 3271746 (June 18, 2020) (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)) (holding that DHS's rescission of the Deferred Action for Childhood Arrivals (DACA) program was arbitrary and capricious, in part for its failure to account for reliance interests); *see also Gaithersburg* Compl. ¶ 113 (noting Plaintiffs' reliance on the longstanding interpretation of "public charge" in "developing government assistance programs and allocating their resources").

DHS failed to address adequately both the chilling effect that the Public Charge Rule is having on benefit usage among noncitizens and their family members and the attendant public-health consequences. *CASA* Compl. ¶¶ 83, 124–25 & n.33, 160.a; *Gaithersburg* Compl. ¶¶ 116–

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from what INS received in 1999. *Fox*, 556 U.S. at 515.

23. Defendants argue that DHS had no obligation to rigorously assess harms associated with this chilling effect because of "the impossibility of estimating precisely" their magnitude. Mot. 17. But DHS cannot discharge its duty to engage in reasoned decisionmaking by simply throwing up its hands. *See Prometheus Radio Project v. FCC*, 939 F.3d 567, 585–86 (3d Cir. 2019) (rejecting asserted unavailability of data as excuse for FCC's failure to address concerns about rules' impact on women's ownership of broadcast media). Moreover, DHS did have data before it estimating the Rule's chilling effect. Numerous rulemaking comments cite a study by the Fiscal Policy Institute estimating that up to 24 million people, including 9 million children (mainly U.S. citizens), could forgo or disenroll from benefits because of the Rule.[19] DHS neither explained why that estimate is inaccurate nor provided an alternative one. Instead, it erroneously dismissed the chilling effect as the product of "unwarranted" decisions by unaffected individuals. 84 Fed. Reg. at 41,313. Similarly, the Ninth Circuit's stay decision mistakenly dismissed the Rule's chilling effect as "indirect" and outside of DHS's regulatory "mandate." *San Francisco*, 944 F.3d at 803. But that position, and Defendants' argument, ignore DHS's obligation to consider "*any* disadvantage" of its rulemaking. *Michigan*, 135 S. Ct. at 2707 (emphasis added).

"The importance of the chilling effect is not the number of disenrollments in the abstract, but the collateral consequences of such disenrollments." *Cook County IV*, 2020 WL 3072046, at *15. In their rulemaking comments, the City of Baltimore and *Gaithersburg* Plaintiffs explained at length the public-health and food-insecurity consequences that will flow from the Rule's chilling effect.[20] As the Seventh Circuit noted, these concerns are far from speculative, having been

[19] *E.g.,* Boundless Immigration, Inc., Comment Letter on Proposed Rule 35 (Dec. 10, 2018), https://downloads.regulations.gov/USCIS-2010-0012-50974/attachment_1.pdf (citing Fiscal Policy Inst., *"Only Wealthy Immigrants Need Apply": How a Trump Rule's Chilling Effect Will Harm the U.S.* (2018), https://perma.cc/PK5W-RJP3).

[20] ILCM et al., Comment Letter to Proposed Rule 37 (Dec. 10, 2018), https://www.regulations.go

painfully highlighted by the COVID-19 pandemic, which "does not respect the differences between citizens and noncitizens." *Id.* Beyond failing to grapple with these health and food-insecurity consequences, DHS also counterintuitively asserted without evidence that the Rule will "ultimately strengthen public safety, health, and nutrition." 84 Fed. Reg. at 41,314. Such "[n]od[s] to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking." *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020).

C. DHS Failed to Adequately Address Public Comments

Although an agency's obligation to respond to rulemaking comments is not "particularly demanding," Mot. 18 (quoting *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441–42 (D.C. Cir. 2012)), it is required to actually "*engage* the arguments raised before it," *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1990) (emphasis added) (quoting *K N Energy, Inc. v. FERC*, 968 F.2d 1295 (D.C. Cir. 1992)). By failing to respond meaningfully to significant comments, DHS did not engage in reasoned decisionmaking.

1. Comments Regarding the Rule's Burden on Taxpayers

DHS's Final Rule failed to grapple with evidence—including the federal government's own studies—that the Rule's harsher standard would undermine, rather than improve, the nation's fiscal standing by excluding immigrants who are net contributors to the federal budget over their lifetimes. *Gaithersburg* Compl. ¶¶ 127–41. This failure to address significant comments before the agency renders the Rule arbitrary and capricious.

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v/document?D=USCIS-2010-0012-47454 [hereinafter "ILCM Letter"] (noting Kaiser Family Foundation research estimating that between 2.1 and 4.9 million Medicaid/CHIP enrollees could disenroll from those programs and Food Research and Action Center research noting increased food insecurity contributes to a range of health problems); Catherine E. Pugh, Mayor of Baltimore, Comment Letter to Proposed Rule 4-6 (Dec. 10, 2018), https://www.regulations.gov/document?D=USCIS-2010-0012-51407 (noting the long-term health and developmental risks associated with children losing SNAP and Medicaid benefits and the threat that Medicaid disenrollment poses to the spread of contagious diseases).

Studies before DHS during notice and comment demonstrate that the Public Charge Rule will increase the burden on U.S. taxpayers, contrary to its stated purpose. As noted in Plaintiffs' comments, Census Bureau studies show that (1) "immigrants are more likely than native born to be fully employed," *id.* ¶ 123; (2) as the U.S. population ages overall, fewer taxpayers will have to shoulder the burden of paying for Social Security, Medicaid, and Medicare benefits relied upon by the elderly, *id*. ¶ 131; and (3) the reduced fertility rate among native-born citizens will not be able to support a sufficient tax base to fund these programs unless the government allows more, not less, immigration, *id.* ¶ 130. And a George Washington University study Plaintiffs cited shows that, on average, an immigrant's income increases at a faster rate over time than the income of a person born in the United States, and that "low-income non-citizen immigrants are less likely to use public benefits like Medicaid and SNAP than similar low-income U.S.-born citizens."[21]

Defendants argue that DHS was not obligated to respond to these concerns because "broad economic theories about the impact of immigration generally on the American economy are well outside the scope of the Rule." Mot. 18–19. But Plaintiffs do not raise generalized concerns about immigration trends. Rather, Plaintiffs' comments focused on the Rule's effect on the public's tax burden—the exact subject of the Rule. As Plaintiffs allege, "[f]ar from reducing the burden 'cast on the public,' the agency's broader definition of public charge will increase the number of able-bodied immigrants who will be labeled 'public charges,' but who, if granted permanent legal status, would likely help to reduce the burden on taxpayers." *Gaithersburg* Compl. ¶ 129 (quoting *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922)).

Defendants' argument that *Gaithersburg* Plaintiffs' comments went beyond the scope of

[21] ILCM Letter, at 34 (quoting Leighton Ku & Drishti Pillai, Milken Inst. Sch. of Public Health, George Washington Univ., *The Economic Mobility of Immigrants: Public Charge Rules Could Foreclose Future Opportunities* 2 (2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285546).

the Rule is belied by the record. By Defendants' own account, DHS *did* consider that "there may be effects on the U.S. economy and on individuals," but was "*unable* to determine the effect of the Rule on every economic entity mentioned or all aspects of future economic growth." Mot. 18 (emphasis added). *Gaithersburg* Plaintiffs did not ask DHS to determine the effect of the Rule on "*every* economic activity" and DHS never explained why it was "unable" to weigh the factors *Gaithersburg* Plaintiffs' comments identified in analyzing whether its new definition of "public charge" was overbroad. Simply put, an agency must do more than announce its conclusions; it must explain itself. *City of Holyoke Gas & Elec. Dep't v. FERC*, 954 F.2d 740, 743 (D.C. Cir. 1992) ("[I]t is a small matter to abide by the injunction of the arithmetic teacher: Show your work!"). Even if DHS was unable to quantify the effects identified by Plaintiffs,[22] it was obliged both to explain *why* it was unable to do so and to undertake a qualitative analysis. *See, e.g.*, *Ill. Commerce Comm'n v. FERC*, 756 F.3d 556, 561, 564–65 (7th Cir. 2014) (criticizing agency's failure to provide "even an *attempt* at empirical justification" (emphasis added)). DHS did neither.

In addition to ignoring the importance of immigrants to the nation's fiscal health in the Rule's overall scheme, DHS also failed to account for these important economic factors in its totality-of-the-circumstances test. In particular, the Rule fails to identify as positive factors Plaintiffs' evidence of (a) immigrants' general disinclination to take public benefits and (b) the likelihood that immigrants' wages will rise faster than their citizen counterparts. *See* 8 C.F.R. § 212.22(b). DHS offered no explanation for this oversight. By failing to account for these factors, DHS "cross[ed] the line from the tolerably terse to the intolerably mute." *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

[22] Given the specific data analyzed by the Census Bureau and by other institutions, it seems implausible that DHS could not estimate the Rule's fiscal impacts.

2. Comments Regarding Credit Reports and Scores

Gaithersburg Plaintiffs allege that credit reports are an unreliable proxy for noncitizens' future self-sufficiency both because the information they contain is inaccurate and because they do not predict long-term economic status. DHS's decision to consider poor credit scores as a negative factor in the totality-of-circumstances analysis—and its failure to meaningfully grapple with this issue—was unreasonable and arbitrary. Defendants' efforts to rebut this argument fail to refute the core problems Plaintiffs raise. Mot. 19–20.

First, Defendants contend that despite "*occasional* flaws," the "widespread use" of credit reports makes them "probative of an individual's financial condition." Mot. 20 (emphasis added). But whether or not credit reports are widely used is irrelevant when the way they are being used here is different from their ordinary purposes. A public-charge determination assesses not whether an applicant *presently* has limited financial means, but whether the applicant is likely to become a public charge in the future. Credit scores are a poor indicator of future self-sufficiency because they are designed to measure a borrower's short-term likelihood of making timely payments, not their long-term financial standing. Indeed, "income or other earnings have no direct bearing on one's credit report or score."[23]

Defendants also cite DHS's observation that it "would not consider the lack of a credit score as a negative factor" as a response to concerns about problems with the reliability of noncitizens' credit reports. *Id*. at 20. But this is beside the point. *Gaithersburg* Plaintiffs are primarily concerned about the negative weight DHS seeks to give *poor* credits scores, which are likely to be inaccurate and therefore cannot provide meaningful evidence of an LPR applicant's future financial status.

[23] Tzedek DC, Comment Letter to Proposed Rule 2 (Dec. 10, 2018), https://www.regulations.gov/document?D=USCIS-2010-0012-46339 [hereinafter "Tzedek DC Letter"].

In particular, DHS failed to address the many ways in which credit reports are inaccurate and therefore unreliable evidence of future financial status. Even by the Government's own account, credit scores and reports frequently contain inaccurate information, making a poor credit score an unreliable data point. *See* Tzedek DC Letter, at 3. Moreover, noncitizens' credit scores are likely to be artificially low for multiple reasons: (1) payments for monthly outlays like rent and utilities—often the major monthly payments for lower-income families—are not considered part of the credit-reporting structure and thus do not factor into noncitizens' credit scores, even if made timely and regularly; (2) applicants for LPR status generally have only a relatively short time in the United States to build their credit history—a key factor in determining credit scores; and (3) credit scores for persons of color, who make up a disproportionately high percentage of those affected by the Rule, are depressed by discriminatory practices. *Id*. at 2–4.

The Final Rule fails to respond adequately to *Gaithersburg* Plaintiffs' objections, raised in the notice-and-comment process, about the use of credit reports and scores in public-charge determinations. Even if DHS disagreed with Plaintiffs' position, it was obligated to "explain why it rejected evidence that is contrary to its findings." *Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 809 (D.C. Cir. 2007). The absence of any substantive response to Plaintiffs' serious objections violates the agency's duty to "engage the arguments raised before it." *NorAm Gas*, 148 F.3d at 1165. DHS's disregard for these issues reflects not "reasoned decisionmaking to which [a court] will defer" but "tenacious dedication to a particular result." *Tenn. Gas Transmission Co. v. FERC*, 789 F.2d 61, 63 (D.C. Cir. 1986).

3. Comments Regarding the Rule's Vagueness and Disparate Impact

Defendants argue that DHS adequately addressed concerns raised in public comments about the Rule's vagueness by (1) providing examples of how immigration officials should apply

the Rule; (2) specifying the categories of noncitizens to whom the Rule does not apply and the public benefits it considers; (3) simplifying the Final Rule compared to the NPRM; and (4) promising to issue "clear guidance" on how the Rule should be applied. Mot. 21–22 (quoting 84 Fed. Reg. at 41,321). As explained *infra*, Pt. IV, DHS's nonbinding examples and changes to the NPRM do not cure the Rule's vagueness. And the Rule's definition of "public charge" and confusing medley of supposedly relevant factors is what makes it vague, not uncertainty about to whom it applies or what benefits it considers. Finally, DHS's promised guidance has only muddied the water further by treating application for LPR status itself as an automatic negative factor in public-charge determinations and by requiring noncitizens to prove "clearly and beyond doubt" that they are unlikely to become a public charge. *See* USCIS Policy Manual vol. 8, pt. G., ch. 2.B.; *id.* ch. 12.A, https://www.uscis.gov/policy-manual/volume-8-part-g (last visited June 23, 2020). DHS's answers to the vagueness concerns were nonresponsive and therefore failed to satisfy DHS's obligation under the APA to address all substantial concerns.

DHS's treatment of comments about the Public Charge Rule's disparate impact were equally inadequate. Defendants argue that DHS adequately addressed these comments by explaining why, in its view, the Rule's disparate impact does not amount to an equal protection violation. Mot. 22; *see also* 84 Fed. Reg. at 41,309 ("To the extent that this rule, as applied, may result in negative outcomes for certain groups, DHS notes that it did not codify this final rule to discriminate . . . ."). But DHS's response does not explain why it was unable to define "public charge" in a manner that yields less stark racial disparities. DHS's legalistic and conclusory response is therefore insufficient.

D. The Final Rule's Non-Monetary Benefits Threshold Is Not a Logical Outgrowth of the Proposed Rule

Gaithersburg Plaintiffs allege that the Final Rule's across-the-board 12/36 durational

definition of "public charge" is not a logical outgrowth of the multi-pronged threshold proposed in the NPRM, violating APA notice requirements. *Gaithersburg* Comp. ¶¶ 148–57. Changing the definition this way reduced the threshold of who may be considered a public charge enough to sweep up individuals that the NPRM expressly found to be self-sufficient, and therefore not a public charge under its own terms. And because DHS failed to provide adequate notice of this strikingly different alternative, the Final Rule's standard was not tested by divergent viewpoints helpful to "ensure informed agency decisionmaking," as required by the APA. *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1980).

Under the standard proposed in the NPRM, the floor for an individual's receipt of "monetizable" public benefits (e.g., SNAP or TANF) to qualify her as a public charge applied only if the value of those benefits "exceeds 15 percent of the Federal Poverty Guidelines (FPG) for a household of one within any period of 12 consecutive months." 83 Fed. Reg. at 51,164.[24] Under this approach, "$1,821 worth of monetizable public benefits for a household of one" would *not* have been sufficient to make an individual a public charge. *Id.* DHS explained its choice of this threshold in the NPRM, recognizing that "individuals may receive public benefits in relatively small amounts . . . without seriously calling into question their self-sufficiency" and that a substantially lower threshold could "lead to unintended consequences." *Id.* at 51,165.

The Final Rule's single 12/36 standard, however, reversed course without notice and abandoned DHS's prior conclusion that an individual's self-sufficiency was not undermined by receipt of small amounts of public benefits. Now, for example, a noncitizen could be deemed inadmissible based on her perceived likelihood of receiving as little as $192 in SNAP benefits over

[24] The NPRM would have evaluated receipt of "non-monetizable" benefits (e.g., Medicaid) under the 12/36 threshold and simultaneous receipt of both types of benefits under a separate durational threshold. *See* 83 Fed. Reg. at 51,289–90. *Gaithersburg* Plaintiffs do not challenge the 12/36 standard *per se* as going beyond the NPRM, but rather its application to monetizable benefits.

12 months—a reduction of nearly 90 percent of the NPRM's proposed threshold. *See supra*, Pt. III.A; *see also* 84 Fed. Reg. 41,351 (acknowledging that, under the 12/36 rule, receipt of "hundreds of dollars, or less, in public benefits annually" would be enough to qualify as a public charge).

Defendants imply that the adoption of the 12/36 standard resulted from concerns raised in the rulemaking comments and argue that, in any event, "the NPRM extensively discussed DHS's proposed definition" and gave commenters an opportunity to propose alternatives. Mot. 20–21 n.8. To be sure, the NPRM asked for comments on the 15-percent-FPG threshold and asked whether "adjudicators [could] assign *some weight*" to receipt of benefits in lesser amounts. 83 Fed. Reg. at 51,165 (emphasis added). But this general notice of potential changes was inadequate, as the NPRM did not provide adequate notice that "the range of alternatives being considered [included the 12/36 standard] with reasonable specificity." *Small Refiners Lead Phase Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983); *see also N.C. Growers Ass'n v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012) (importance of a meaningful opportunity to comment "cannot be overstated"). That commenters overwhelmingly argued that the NPRM's more lenient monetary threshold was *too low*, *see* 84 Fed. Reg. at 41,357–58 (summarizing widespread opposition to that threshold), highlights the lack of notice of the harsher 12/36 standard. Rather than respond, the Final Rule introduced the entirely new single 12/36 threshold, thereby effectively reducing the monetary threshold for some benefits to a small fraction of that noticed in the NPRM.

Because an agency "does not have carte blanche to establish a rule contrary to its original proposal" under the APA, judicial review in such cases is "not constrained by the degree of deference" afforded most agency determinations. *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103–04 (4th Cir. 1985). The NPRM did not specify a vastly reduced monetary threshold as an alternative, as evidenced by the failure of any comments to address it. *Sprint Corp. v. FCC*, 315

F.3d 369, 376 (D.C. Cir. 2003). And given the overwhelming opposition to the higher 15-percent-FPG threshold, the absence of such comments is not evidence of acquiescence. *See Chocolate Mfrs.*, 755 F.2d at 1105 (finding notice inadequate in "the absence of comments from groups which could be expected to oppose"). Accordingly, the Final Rule violates APA's notice requirements.

IV. PLAINTIFFS ADEQUATELY ALLEGE THAT THE RULE IS UNCONSTITUTIONALLY VAGUE

The "first essential of due process of law" is that individuals not be deprived of a protected interest on the basis of a law "so vague that men of common intelligence must necessarily guess at its meaning and differ as to application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Here, Defendants contend that *CASA* Plaintiffs do not have a protected interest and that the Public Charge Rule is not vague. They are incorrect on both counts.

Defendants first mischaracterize the void-for-vagueness claim as asserting a liberty or property interest in adjustment of status, which is a discretionary immigration benefit. Mot. 22–23. Plaintiffs claim no entitlement to any type of immigration benefit or relief.[25] Instead, their void-for-vagueness claim is premised on their liberty interest in "be[ing] and remain[ing] in the United States." *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1230 (2018) (Gorsuch, J., concurring) (discussing the "liberty interest . . . to remain in and move about the country"); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (describing the "right to stay and live and work in this land of freedom" as a liberty interest). In attempting to distinguish this case from *Dimaya*, Defendants spotlight the LPR status of the

[25] The cases cited by Defendants addressing the denial of immigration benefits are therefore inapposite. *See* Mot. 22–23. Plaintiffs' void-for-vagueness claim concerns only statutory eligibility for adjustment of status, which is a nondiscretionary assessment, not DHS's ultimate discretion to grant or deny the benefit to eligible noncitizens. *See Hernandez v. Ashcroft*, 345 F.3d 824, 845 (9th Cir. 2003) ("The first step in adjudicating a petition for adjustment of status is the nondiscretionary determination of statutory eligibility, followed by a discretionary determination regarding whether an eligible applicant is actually permitted to adjust status.").

noncitizen in that case. Mot. 23. But the liberty interest in remaining in the United States does not turn on having any particular immigration status. Rather, it is possessed by all those who "ha[ve] entered the country, and ha[ve] become subject in all respects to its jurisdiction, and a part of its population," including even noncitizens who are "alleged to be here illegally." *The Japanese Immigrant Case*, 189 U.S. at 101.

Noncitizens' liberty interest in remaining in the United States is directly implicated by the Public Charge Rule both because noncitizens are deportable if they are found inadmissible when attempting to adjust status, and because noncitizens who lack LPR status will at some point become deportable if they are unable to adjust status. 8 U.S.C. § 1227(a)(1)(A); *see also id.* § 1227(a)(1)(B) (classifying as deportable "[a]ny alien who is present in the United States in violation of" the INA); *id.* § 1227(a)(1)(C)(i) (classifying as deportable "[a]ny alien who was admitted as a nonimmigrant and who failed to maintain [her] nonimmigrant status"). Thus, any noncitizen who is found inadmissible on public-charge grounds while attempting to adjust status not only would fail to obtain LPR status but also could face deportation. *See Barton v. Barr*, 140 S. Ct. 1442, 1452 (2020) (recognizing that "Congress has employed the concept of 'inadmissibility' as a status" that is "relevant in several statutory contexts" that determine whether noncitizens may remain in the United States). For the INA to protect meaningfully a noncitizen's liberty interest in remaining in the United States, due-process safeguards must apply when she faces the prospect of acquiring the status of an inadmissible noncitizen, rendering her deportable. *See Manning v. Caldwell*, 930 F.3d 265, 268, 274 (4th Cir. 2019) (en banc) (holding unconstitutionally vague "a series of interrelated statutes that operate as a single scheme").

There is nothing new or "radical," Mot. 23, about Plaintiffs' position that the INA's inadmissibility provisions implicate their liberty interest in remaining in the United States. Indeed,

the Supreme Court has held that LPRs returning from a short stay abroad (who are treated as constructively on U.S. soil) are entitled to due-process safeguards before being barred from re-entering the United States on the basis of an inadmissibility ground. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *see also Kwong Hai Chew v. Colding*, 344 U.S. 590, 601–03 (1953) (construing a regulation authorizing the denial of pre-exclusion hearings not to apply to an LPR returning from a brief absence from the United States to avoid a constitutional problem). *Plasencia* and *Chew* therefore confirm that due process must be accorded when the INA's inadmissibility provisions are applied in a manner that could result in the removal of noncitizens who are actually or constructively present in the United States.

As for the merits, because the Public Charge Rule implicates noncitizens' liberty interest in remaining in the United States, it must be reviewed under "the most exacting vagueness standard." *Dimaya*, 138 S. Ct. at 1213. The Rule fails to meet this high bar. Even DHS admits that public-charge determinations under the Rule will be "inherently subjective," "will vary," and will not [be] governed by clear data." 84 Fed. Reg. at 41,315, 41,397. Fundamentally, the Rule's confusing and unguided medley of supposedly relevant factors does not provide sufficient guidance to satisfy due process. *CASA* Compl. ¶ 94.b. Immigration officials forecasting whether an individual will temporarily rely on public benefits at some point in her life have virtually unconstrained discretion to decide whether, for example, future, sudden changes in individual circumstances will deplete their resources, *id.* ¶ 94.d, or whether a noncitizen's wages will follow the general trend and increase dramatically over time, *id.* ¶ 94.f. The prediction called for by the Rule is further complicated because exceptionally few noncitizens who lack LPR status are eligible for public benefits considered by the Rule (so past fails as prologue), *id.* ¶ 94.a, and because DHS's definition of "public charge" would encompass about half of the U.S. population—a group so large

and varied that it defies characterization, *id.* ¶ 72. Simply put, the Rule provides no means of predicting which half of the U.S. population a noncitizen is likely to resemble over her entire lifetime. Enforcement of the Rule will therefore "devolv[e] into guesswork and intuition," *Johnson v. United States*, 135 S. Ct. 2551, 2559 (2017), inviting arbitrary and even discriminatory enforcement and offering noncitizens virtually no notice of what could make a USCIS officer deem them inadmissible on public-charge grounds.[26]

Defendants deflect from the Rule's defects by suggesting that the 1999 Field Guidance was equally vague and that the Rule could have been even more vague had DHS not revised the NPRM. Mot. 23–24. Neither argument is persuasive. In addition to formalizing the longstanding interpretation of "public charge," the 1999 Field Guidance identified as proxies for that standard public benefits whose recipients are either unable to work because of disability, blindness, or age (SSI and long-term institutionalization at government expense) or overwhelmingly have a sustained history of unemployment (TANF and general assistance). *CASA* Compl. ¶¶ 66-69. As DHS admits, no such objective facts signal a noncitizen's likelihood of exceeding the Public Charge Rule's 12/36 standard at any point in the indefinite future. And that the NPRM was even more inscrutable than the Final Rule does not excuse the latter's unconstitutional vagueness.

Accordingly, Plaintiffs have plausibly alleged that the Rule is void for vagueness.

V. PLAINTIFFS ADEQUATELY ALLEGE AN EQUAL PROTECTION CLAIM

Plaintiffs have adequately alleged that the Public Charge Rule, although facially neutral, was motivated at least in part by animus toward non-European and nonwhite immigrants. The Fifth Amendment prohibits the federal government from taking action for which discriminatory

[26] DHS did not cure any of these defects by providing barely explained and nonbinding examples in the NPRM, making modest changes to the NPRM in the Final Rule, or publishing "hundreds of pages" about the Rule in the Federal Register. Mot. 23.

intent or purpose is a "motivating factor." *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977); *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016). Discriminatory intent can be proven through evidence of, among other things: (1) disparate impact; (2) the "historical background" of the challenged policy, including "contemporary statements" by the relevant decisionmakers; (3) "the specific sequence of events leading up to the challenged decision," including whether the law departs from longstanding prior practice; (4) "[d]epartures from the normal procedural sequence"; and (5) "substantive departures, . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 266–68. Plaintiffs have set forth well-pleaded allegations concerning all five of the *Arlington Heights* factors. *See CASA* Compl. ¶¶ 102–09 (disparate impact); *id.* ¶¶ 110–15, 117–19 (historical background and contemporaneous statements); *id.* ¶ 116 (sequence of events); *id.* ¶ 121 (substantive and procedural departures); *Gaithersburg* Compl. ¶¶ 161–63.

Without disputing the Public Charge Rule's disparate impact on non-European and nonwhite immigrants, Defendants argue that a policy cannot be set aside based on disparate impact alone. Mot. 24. But disparate impact is "an important starting point" for proving discriminatory intent, even if it is not always dispositive. *Arlington Heights*, 429 U.S. at 266; *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 705 (9th Cir. 2009) (denying motion to dismiss equal protection claim based on disparate impact alone). And because the Rule will have a less negative impact on noncitizens from Europe, Canada, and Oceania than on noncitizens from other parts of the world, *CASA* Compl. ¶¶ 105–07, the Rule's disparate impact cannot be dismissed as the product of nonwhite immigrants making up "a large share" of the immigrant population. *Regents of the Univ. of Cal.*, 2020 WL 3271746, at *16 (plurality).

Defendants also shrug off the extensive remarks made by President Trump and other senior Executive Branch officials from which discriminatory intent can be inferred as "stray comments by certain non-DHS government officials." Mot. 24, 26. As an initial matter, this argument wholly ignores Plaintiffs' allegations concerning Acting USCIS Director Kenneth Cuccinelli, who is a DHS official and was one of the key decisionmakers in enacting the Rule. *CASA* Compl. ¶ 118 (quoting Cuccinelli defending the Rule as consistent with Emma Lazarus's poem on the Statue of Liberty's pedestal because the "poor," "homeless," "huddled masses" the poem refers to were "coming from Europe"); *see also Cook County v. Wolf (Cook County III)*, --- F. Supp. 3d ---, 2020 WL 2542155, at *6 (N.D. Ill. May 19, 2020) (holding that the Rule's discriminatory intent reasonably can be inferred from Cuccinelli's statement). These remarks were neither "remote in time" nor "made in unrelated contexts" and therefore are strong evidence of discriminatory intent. *Regents of the Univ. of Cal.*, 2020 WL 3271746, at *16 (plurality).

Defendants also are wrong to dismiss the comments made by President Trump and his top immigration adviser, Stephen Miller, as irrelevant to understanding the motivations for the Public Charge Rule.[27] First, Miller's agitation for quicker promulgation of the Rule reinforces the inference that his views played a direct role in shaping it. *CASA* Compl. ¶ 117. His actions also underscore that the enactment of the Rule was no "natural response to a newly identified problem," but an "irregular" effort by the White House to rush the administrative process. *Regents of Univ. of Cal.*, 2020 WL 3271746, at *16 (plurality). Second, President Trump is the head of the Executive Branch, and his "discriminatory motivation cannot be laundered through" DHS. *CASA de Maryland, Inc. v. Trump*, 355 F. Supp. 3d 307, 326 (D. Md. 2018) (citing *Staub v. Proctor*

[27] The Fourth Circuit has not taken such a narrow view of what sorts of contemporaneous remarks are relevant to inferring discriminatory intent. *See Jesus Christ Is the Answer Ministries, Inc. v. Baltimore County*, 915 F.3d 256, 264–65 (4th Cir. 2019) (holding that comments made by members of the public at a zoning hearing were relevant to an *Arlington Heights* analysis).

Hosp., 562 U.S. 411, 413 (2011)) (rejecting an argument that the DHS "Secretary was the decision-maker, not the President" in terminating Temporary Protected Status (TPS) for Salvadoran nationals). Defendants' contention to the contrary also clashes with arguments made elsewhere by the Government that the President has a "unitary role in supervising the Executive Branch." *Cook County III*, 2020 WL 2542155, at *8.

DHS's official explanation for the Rule's promulgation in the NPRM and Final Rule does not negate the ample evidence of discriminatory intent discussed above, particularly at the motion-to-dismiss stage.[28] Mot. 25–26. To prevail on their equal protection claims, Plaintiffs need not establish that discriminatory intent was the "sole[]" motivation for the Public Charge Rule, or even "the 'dominant' or 'primary' one." *Arlington Heights*, 429 U.S. at 265. The Rule would be invalid even if a discriminatory motive *and* DHS's stated self-sufficiency goals contributed to the Rule's enactment. Moreover, DHS's nondiscriminatory explanations for the Rule cannot be the basis for dismissal when Plaintiffs have alleged countervailing evidence of discriminatory intent. *See Jesus Christ Is the Answer*, 915 F.3d at 263 ("So long as a plaintiff alleges a plausible prima facie claim of discrimination, a court may not dismiss that claim—even if the defendant advances a nondiscriminatory alternative explanation for its decision, and even if that alternative appears more probable."); *accord Woods v. City of Greensboro*, 855 F.3d 639, 649 (4th Cir. 2017).

Perhaps recognizing the vulnerability of the Public Charge Rule under *Arlington Heights*, Defendants also argue that equal protection claims in the immigration context must be evaluated under the more deferential standard articulated in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Mot.

[28] *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), is inapposite. In that case, the plaintiff argued that a veterans' preference statute violated the Equal Protection Clause based solely on its disparate impact on women. *Id.* at 275. Plaintiffs do not rely exclusively on disparate impact to allege the Rule's discriminatory intent.

25. This Court has previously rejected that argument, holding that *Hawaii* does not apply to equal protection claims like Plaintiffs' that concern "residents who have lived in the United States for years and have established deep connections . . . to this country" and that do not implicate "national security or foreign policy concerns." *CASA v. Trump*, 355 F. Supp. 3d at 322–25; *accord NAACP v. DHS.*, 364 F. Supp. 3d 568, 576 (D. Md. 2019). For similar reasons, the Northern District of Illinois recently declined to apply *Hawaii* in denying a motion to dismiss an equal protection challenge to DHS's Rule. *Cook County III*, 2020 WL 2542155, at *6–7 (noting that "DHS justified and continues to justify the Final Rule solely on economic grounds").

But even if *Hawaii* governs Plaintiffs' equal protection claims, the rational-basis review applied in that case "is not toothless," and statements made by President Trump, Acting Director Cuccinelli, and other Executive Branch officials reflecting animus toward non-European and nonwhite immigrants are relevant to the rational-basis analysis. *Baltimore*, 416 F. Supp. 3d at 514–15 (applying *Hawaii* and denying a motion to dismiss a similar equal-protection challenge to the State Department's public-charge rule);[29] *see also Make the Rd. N.Y.*, 419 F. Supp. 3d at 664–65 (granting preliminary injunction based on equal protection challenge to DHS's Public Charge Rule without holding that heightened scrutiny applies). Accordingly, Plaintiffs' equal protection claims should not be dismissed under any potentially applicable standard of review.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Dismiss.

[29] In *Baltimore*, this Court applied the *Hawaii* standard because, unlike DHS's Public Charge Rule, the State Department's similar rule applies only to noncitizens outside the United States. 416 F. Supp. 3d at 514 (stating that "little daylight exists between *Hawaii* and the case *sub judice*" because "plaintiff mounts a constitutional challenge to an Executive Branch policy concerning the entry of foreign nationals into the country").

Respectfully submitted,

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Dated: June 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2020, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ *Jonathan L. Backer*
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