UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MERCEDES ROURKE-ROGRIGUEZ, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION, et. al.,

Defendants.

Civil Action No.
8:25-cv-00738 (AJB/DJS)

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

Plaintiffs wrongly allege that the Department of Education's (the "Department") policy statements regarding acceptable documentation for confirming student aid eligibility, as published in the Federal Student Aid Handbook (the "FSA Handbook") and an electronic announcement issued in January 2025 (collectively, the "Guidance"), are contrary to law and lack sufficient justification. But the facts and law show that the Department acted in good faith to conform its policies to *existing* law. Plaintiffs ask the Court to compel the Department to maintain its previous documentation policy, which was incompatible with the Department's obligation to ensure that all federal student aid recipients demonstrate eligibility under the law. The Department's updated Guidance was first published in February 2024 after inter-agency review and consultation with the Department of Homeland Security ("DHS") with the goal of conforming existing policy to longstanding regulations that unambiguously require that *all noncitizens* must provide evidence of their immigration status *from* DHS. Plaintiffs incorrectly assert that they, as Canadian-born American Indians, are completely exempt from any documentation requirements evidencing their immigration status for purposes of student aid eligibility. No such exemption exists in the Higher Education Act ("HEA"), the Jay Treaty, or any other immigration law.

Plaintiffs fundamentally misinterpret their right to free passage as a blanket exemption from the reasonable requirement that all noncitizens must evidence their immigration status as a condition to receiving federal student aid. Plaintiffs' position is that they are noncitizen permanent residents because the Jay Treaty made them so, and no further documentary evidence may ever be required. Of course that is not the case, and Plaintiffs' claim to lawful permanent resident status does not make it true without documentary evidence of such status from the Government agency tasked with administering the immigration system. Plaintiffs seek a public benefit to which they may be duly entitled, and the Government has no reason to question their eligibility for the required documentation, or the student aid benefits they seek. But the Department is obligated to ensure Plaintiffs *are* in fact eligible, and the only way to do that is through documentation *from* DHS—the only Government entity capable of verifying an individual's immigration status. Plaintiffs' claim that the change in policy is evidence of some ill-intent is unsupported by the record, which shows that the Department took appropriate steps to address an erroneous interpretive rule that did not comport with existing law and regulation. The existence of past policy that was more beneficial to Plaintiffs is immaterial because the Department is obligated to conform its policies to the law. This Court should not compel the Department to continue an unlawful policy simply because Plaintiffs disagree with the new policy and claim prejudice and inconvenience in obtaining the documentation required to prove their eligibility for student aid.

Further, Plaintiffs lack standing to invoke the Court's jurisdiction to hear the case because Plaintiffs only allege self-inflicted injuries due to their own failure or refusal to comply with the Guidance. Plaintiffs fail to support their allegations of injury with *any evidence* to establish standing. At the summary judgment stage, the complete absence of any evidence of injury or any showing that the Guidance has or will ever prevent Plaintiffs from obtaining student aid is fatal to the Court's jurisdiction. In the absence of jurisdiction, the Court must dismiss this suit.

BACKGROUND

I. Legal Background and Plaintiffs' Claims

The HEA states that "[i]n order to receive any grant, loan, or work assistance[,]" an applicant must either "be a citizen or national of the United States, a permanent resident of the United States, or able to provide evidence *from* [DHS] that he or she is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident."

20 U.S.C. § 1091(5) (emphasis added).[1] The corresponding regulation states that "to be eligible to receive" student aid, the applicant must either be a citizen or "provide evidence from [DHS]" showing that the applicant "is a permanent resident[,]" or is in the United States "with the intention of becoming a citizen or permanent resident." 34 C.F.R. § 668.33(a). Thus, under existing regulations, all noncitizen applicants for student aid must produce "evidence *from* [DHS]" showing their eligibility for aid. *Id*. § 668.130 (emphasis added).

Certain Canadian-born American Indians enjoy unique immigration status in the United States allowing them to freely cross the U.S.-Canadian border. This right was first established following the Revolutionary War, when the United States and Great Britain adopted Article III of the Jay Treaty, 8 Stat. 116. *See Karmuth v. United States*, 279 U.S. 231, 235-36 (1929). Congress later codified this right to freely pass across the border in 8 U.S.C. § 1359:

> Nothing in this subchapter[2] shall be construed to affect the right of American Indians born in Canada to *pass the borders* of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

(emphasis added). DHS regulations implement this statute through 8 C.F.R. § 289. Both the statute and the regulation allow eligible American Indians born in Canada to enter the United States. But to qualify for these privileges, eligible persons must provide evidence of their qualifying American Indian background at a port of entry. *See U.S. Customs and Border*

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[1] The statute refers to the Immigration and Naturalization Service ("INS"), which was abolished in 2003 and whose functions were reassigned to three agencies within DHS—U.S. Immigration and Customs Enforcement ("ICE"), the U.S. Citizenship and Immigration Services ("USCIS"), and Customs and Border Protection ("CBP"). Thus, references to "INS" in the regulation are replaced with "DHS."

[2] The statute as enacted by Congress as Section 289 of the Immigration and Nationality Act ("INA"), Pub. L. 82-414, 66 Stat. 234, referred to "this title," *i.e.*, to title II of the INA. Most, but not all, of the provisions in subchapter II are also provisions in title II of the INA.

Protection, Do Native Americans need documents to enter the United States?, https://www.help.cbp.gov/s/article/Article-1241?language=en_US (Feb. 17, 2026).

Persons who meet the requirements of 8 U.S.C. § 1359 and have maintained residence in the United States since entry are regarded as lawfully admitted for permanent residence, 8 C.F.R. § 289.2, may readily obtain a Permanent Resident Card (Form I-551, known colloquially as a "Green Card"), *see U.S. Citizenship & Immigration Services, Green Card for an American Indian Born in Canada*, https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-an-american-indian-born-in-canada (Feb. 17, 2026), and may also obtain an Arrival/Departure Record (Form I-94) at a port of entry, *see U.S. Customs and Border Protection*, *Arrival and Departure Forms,* https://www.cbp.gov/travel/international-visitors/i-94 (Feb. 17, 2026). Plaintiffs do not allege that any policy of the Department or DHS renders them ineligible for such documentation. *See generally* Dkts. 25 (Amended Complaint); 34 (Motion for Summary Judgment). Thus, if Plaintiffs' alleged immigration status and tribal membership are accurate, it is undisputed that they are eligible for DHS-issued documentation sufficient to verify their immigration status as permanent residents.

II. Procedural History

On February 28, 2024, the Department published updates to its FSA Handbook for the 2024-2025 academic year. *See* Statement of Material Facts ("SOMF") ¶ 1. The FSA Handbook is an annual publication intended for use by institutions of higher education participating in student aid programs under Title IV of the HEA. *Id.* ¶¶ 2-4. Based on feedback DHS provided to the Department during a routine inter-agency review process, the Handbook included updates to Department policy regarding documentation requirements for certain Canadian-born American Indians. *Id.* ¶¶ 8-10. The updates were deemed necessary to conform to Department regulations that require noncitizen applicants to verify their immigration status through "evidence from" components of DHS, such as USCIS. *Id*. ¶¶ 10-11. The Handbook identified certain forms of documentation issued by DHS (Forms I-94 and I-551) that student loan applicants could use to verify their immigration status and removed certain forms of documentation previously listed in earlier editions of the Handbook that are not issued by DHS. *Id*. ¶ 12.

After the Handbook was published, the Department received inquiries from interested parties requesting further information about how to comply with the Handbook updates. *Id*. ¶ 13. In response to those inquiries, on January 15, 2025, the Department issued an electronic announcement to institutions and financial aid counselors, informing the public and these institutions that the new documentation requirements for Canadian-born American Indians need not apply to students who previously received federal student aid for any prior award year, consistent with the Department's implementing regulations for other eligible noncitizens who have previously demonstrated eligibility for federal student aid. *Id*. ¶ 14; 34 C.F.R. § 668.133(b). The effect of the electronic announcement, consistent with existing regulation, was to allow institutions of higher education to exempt (or "grandfather") students whose academic institution had previously deemed them eligible for Title IV aid in any prior award year. *See id*. ¶ 17. In other words, the electronic announcement updated the Guidance to advise that institutions would only be required to obtain such DHS-issued documentation for students who were seeking aid eligibility for the first time. *See id*. ¶¶ 15-17.

As each of the Plaintiffs had received student aid in an award year prior to 2025-2026, the Plaintiffs were all expressly excepted from the Department's Guidance if their academic institution were to permit it. *See* SOMF ¶¶ 21-22. Plaintiffs now *allege*, without any evidentiary support, that their academic institutions have not excepted them from the Guidance, despite their eligibility for such exception as prior aid recipients. *See id*. ¶¶ 21-22, 24; *see also* Dkt. 25, ¶¶ 35-45 (Plaintiffs claiming, without evidence, to have "suffered an injury" but not directly addressing or disputing their eligibility for an exception under the Guidance). Although Plaintiffs' own allegations suggest they would be entitled to the required documentation from DHS, Plaintiffs did not obtain it. Instead, Plaintiffs filed this suit challenging the Guidance. Dkt. 1. Despite the harm they claim to suffer, Plaintiffs do not allege any efforts to comply with the Guidance. *See generally* Dkt. 25. Nor have Plaintiffs provided any evidence that they made any effort to challenge their institutions' alleged decisions not to except them from the Guidance, despite their apparent eligibility for exception. *See id.*

In July 2025, Defendants moved to dismiss Plaintiffs' complaint for failure to state a claim for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Dkt. 12. The Court granted that motion, finding that Plaintiffs failed to allege that they were enrolled in a qualified educational program for the 2025-2026 academic year, or that they applied for federal student aid for the 2025-2026 award year. Dkt. 22 at 12-13 (Court's order dismissing the complaint with leave to amend). Plaintiffs later amended the complaint to include conclusory allegations that they were enrolled for the 2025-2026 academic year and had applied for federal student aid. Dkt. 25. Defendants filed the Administrative Record ("AR") on January 9, 2026. Dkt. 33. Plaintiffs moved for summary judgment on February 4, 2026, but their motion is devoid of *any* evidence supporting their allegations that they applied for student aid for the 2025-2026 year, that they were denied student aid by the Department based on their lack of documentation, or that their institutions rejected their requests for aid based on their lack of required documentation from DHS to show eligibility for aid under the Guidance (which exempts Plaintiffs' from such requirements if an institution previously determined Plaintiffs eligible, which the institutions did). *See generally* Dkt. 34.

Defendants submit this cross-motion for summary judgment requesting that Plaintiffs' motion be denied, and that this suit be dismissed on the merits in their favor.

Plaintiffs failed to comply with Local Rule 56.1, which compels a moving party to submit a statement of material facts with all motions for summary judgment. Local Rule 56.1(a) states that "[f]ailure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion." Nothing exempts Plaintiffs from complying with this rule here. This omission is especially significant in this case where Plaintiffs have had notice that Defendants contested standing, see Dkt. 12, and the veracity of the allegations underlying their claims to standing in the Amended Complaint, see Dkt. 28. Plaintiffs' failure to present any evidence by affidavits or other means supporting their allegations of standing is dispositive of the Court's jurisdiction on summary judgment. *See, e.g.*, *Hogan v. CVS Albany*, LLC, No. 19-cv-1455 (GLS/DJS), 2022 WL 4549224, at *2 (N.D.N.Y. Sept. 29, 2022) (denying summary judgment where movant failed to submit a statement of material facts in compliance with L.R. 56.1(a)).

LEGAL STANDARD

Under the APA, "courts review agency action to determine if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Friends of Animals v. Romero*, 948 F.3d 579, 585 (2d Cir. 2020) (quoting 5 U.S.C. § 706(2)(A)). The function of the reviewing court is to decide "as a matter of law" whether "the evidence in the administrative record permitted the agency to make the decision it did." *Roberts v. United States*, 883 F. Supp. 2d 56, 62 (D.D.C. 2012), *aff'd*, 741 F.3d 152 (D.C. Cir. 2014). Summary judgment is the appropriate mechanism for resolving APA challenges to agency action because the question whether an agency action is supported by the administrative record and consistent with the APA standard of review is decided "as a matter of law." *See Residents for Sane Trash Sols., Inc. v. U.S. Army Corps of Eng'rs*, 31 F. Supp. 3d 571, 586 (S.D.N.Y. 2014). In resolving that question, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). When the relevant statute confers discretionary authority on the agency, a court fulfills its obligations under the APA by identifying and respecting that delegation. *Id*. at 404, 413.

Under the narrow standard of review applicable in APA cases, a "court is not empowered to substitute its judgment for that of the agency." *Friends of Ompompanoosuc v. FERC*, 968 F.2d 1549, 1554 (2d Cir. 1992) (quoting *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Rather, a court may only overturn an agency's action if it finds that the agency has relied on factors which Congress "has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Karpova v. Snow*, 497 F.3d 262, 267-68 (2d Cir. 2007) (citation omitted). In general, "a court reviewing an agency decision is confined to the administrative record compiled by that agency when it made the decision*." Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). The ultimate question is whether the agency's action was reasonable. *FCC v. Fox Television Stations*, 556 U.S. 502, 514-15 (2009).

ARGUMENT

Defendants are entitled to summary judgment because Plaintiffs have not shown they have standing to challenge the Guidance. But even if the Court finds that it has jurisdiction, it should still grant summary judgment to Defendants because the Guidance conforms agency policy to the law, and the Department complied with all procedural requirements when it issued the Guidance.

I. The Court Lacks Subject Matter Jurisdiction Because Plaintiffs Have Not Met Their Burden to Establish Standing[3]

Subject matter jurisdiction is determined based on the facts at the time the complaint was filed. *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570-71 (2004). And for issues that determine whether a court has subject matter jurisdiction, plaintiffs bear the burden of establishing jurisdiction. *MLC Fishing, Inc. v. Velez*, 667 F.3d 140, 141 (2d Cir. 2011). As the party invoking federal jurisdiction, Plaintiffs bear the burden at the summary judgment stage to "'set forth' by affidavit or other evidence 'specific facts'" establishing their standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411-12 (2013) (citation omitted). "Under Article III of the U.S. Constitution, '[t]he judicial Power of the United States' extends only to certain 'Cases' and 'Controversies.'" *Lacewell v. Off. of Comptroller of Currency*, 999 F.3d 130, 141 (2d Cir. 2021) (quoting U.S. Const. art. III §§ 1-2). "To satisfy the Constitution's 'case-or-controversy requirement,' a plaintiff in federal court 'must establish that they have standing to sue.'" *Id.* (quoting *Clapper*, 568 U.S. at 408). To do so, they must show they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citations omitted). They cannot rely on speculation about "the unfettered choices made by independent actors not before the courts." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

Although the standing burden does not require plaintiffs to demonstrate that it is "literally certain that the harms they identify will come about," a "threatened injury must be certainly

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[3] The Court previously dismissed Plaintiffs' complaint, with leave to amend, because they failed to allege facts sufficient to confer standing. Dkt. 22 at 7-13. And although Plaintiffs added some factual allegations in their amended pleading in a second attempt to allege standing, those allegations are not evidence. At the summary judgment stage, Plaintiffs must proffer evidence to support those allegations. But Plaintiffs have not done so. *See generally* Dkt. 34 (presenting no evidence that Plaintiffs suffered any injury). They have therefore failed to meet their burden to invoke the Court's jurisdiction.

impending to constitute injury in fact, and [ ] allegations of possible future injury" are not sufficient. *Clapper*, 568 U.S. at 409, 414 n.5 (citations omitted). The showing should correspond to the "manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. At the summary judgment stage, plaintiffs can no longer rest on allegations in the complaint to establish standing. *Id.*

A. Plaintiffs' Injuries Are Self-Inflicted Due to Their Choice Not to Comply with the Guidance

Plaintiffs have not shown any injury sufficient to confer Article III standing because the Guidance did not prevent them from receiving federal student aid. *See generally* Dkt. 25 (Amended Compl.). The Amended Complaint merely recites cursory allegations of harm to each Plaintiff. This may have been sufficient at the pleading stage but does not suffice on summary judgment. Plaintiffs have not shown, beyond formulaic allegations, that the Department or any educational institution has ever demanded immigration records during the FAFSA process. *Id.* As explained in Defendants' motion to dismiss (*see* Dkt. 12-1 at 14-15, 22-27), the Guidance provides a "grandfathering clause" based on existing regulation, 34 C.F.R. § 668.133(b), which exempts Plaintiffs from the Guidance as individuals who received student aid in a prior award year. *See* SOMF ¶¶ 10-17. Notably, despite knowing that Defendants disputed the Plaintiffs' standing to pursue these claims, Plaintiffs' summary judgment motion fails to produce any evidence in support of summary judgment to show that they suffered the injuries they now claim. There are no sworn affidavits, declarations, or any other evidence before the Court that would support Plaintiffs' allegations of injury, much less any evidence to meet *their burden* to show that they have been injured by the Guidance. Thus, as a threshold matter, the Court lacks jurisdiction to evaluate the merits.

Plaintiffs Amended Complaint lacks even the barebones, conclusory affidavits that were included with the first complaint. *Compare* Dkts. 1, 1-1, and 1-2, *with* Dkt. 25 (containing no affidavits). Plaintiffs falsely allege that the Guidance has prevented them from completing their FAFSA applications and that "absent relief" they will not receive the aid necessary to attend college. *See id.* Thus, the allegation that the Guidance is preventing their access to student aid is contradicted by the available evidence. Further, the record shows that each of the Plaintiffs received student aid prior to the 2025-2026 academic year. SOMF ¶¶ 21-22. Thus, under the terms of the Guidance, and the Department's regulations, Plaintiffs fall within the category of students that qualify for an exception based on prior eligibility. *Id.*; *see also* 34 C.F.R. § 668.133(b). While Plaintiffs allege in cursory fashion that they sought grandfathering relief and were denied by their institutions, that is not evidence of injury, and Plaintiffs offer none in support of their motion for summary judgment. *See generally* Dkts. 25, 34.

Second, even if Plaintiffs had made *any* showing of injury by affidavit or otherwise, they cannot show that Defendants *caused* that injury. An alleged injury is not sufficient for standing purposes if it "results from the independent action of some third party not before the court" or is "self-inflicted." S*imon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)); *Clapper*, 568 U.S. at 416 (noting that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves"). Here, as Plaintiffs do not dispute that they were entitled to an exception under the Guidance (and have made no showing that they were determined to be nonexempt), there is no nexus whatsoever between the alleged harm and the Department's actions in issuing the Guidance. Moreover, *even if* an institution determined Plaintiffs were not exempt from the Guidance, as they now allege, that decision would have been made by the third-party institution—not the Department, which expressly excepted them from the Guidance. *See* SOMF ¶¶ 21-22, 24. The

Department created the "grandfathering" carve-out specifically for students like Plaintiffs after receiving feedback that some students could have trouble complying with the requirements. *Id.* ¶¶ 13-14, 17. Yet, Plaintiffs fail to show that they made any effort to avail themselves of that exemption; rather they *allege* without supporting evidence that their institutions rejected their applications for lack of documentation. *See* Dkt. 25 ¶¶ 35-45.

Plaintiffs do not claim that they cannot obtain the requisite documentation to verify their immigration status; rather, they allege only that they have chosen not to do so. Specifically, Plaintiff Rourke-Rodriquez claims that she applied for a U.S. Passport as evidence of her eligibly but did not complete that process by the time of filing and claims she was informed by her institution that she "would need a Green Card to establish her eligibility." Dkt. 25. ¶¶ 35-38. But she admits that she received student aid in previous years, which places her within the class of Jay Treaty students excepted under the Guidance. *Id.* ¶ 35; SOMF ¶¶ 21-22. Similarly, Plaintiff Swamp admits that he was awarded aid prior to the Guidance but claims that he deferred enrollment until 2025 and is now "unwilling as a matter of principle to comply with the Department's unlawful new requirements and so is not attending college at present." *Id.* ¶¶ 39-41. Plaintiff Thompson alleges she is currently enrolled in college but was told by "her school guidance counselor . . . that she now needs a Green Card in order to submit a FAFSA." *Id.* ¶ 43. Plaintiff Thompson is allegedly "unwilling to apply for a Green Card and so is unable to submit a FAFSA." *Id.* These allegations, which are completely unsupported by any evidence whatsoever, simply do not suffice to demonstrate standing required to invoke the Court's jurisdiction. Indeed, Plaintiffs admit either that they have not taken or completed the necessary steps to comply with the Guidance (Rourke-Rodriguez), or that they refuse to comply with the requirement that they secure documentation from DHS showing their status as noncitizen permanent residents (Swamp and Thompson). Even assuming the accuracy of their allegations, these circumstances represent self-inflicted injuries.

Plaintiffs cannot plead their way to standing at the summary judgment stage. Instead of establishing standing through affidavits and supporting documentation, Plaintiffs attempt to circumvent the standing requirement by citing *Federal Election Commission v. Cruz*, 596 U.S. 289 (2022), and *Antonyuk v. James*, 120 F.4th 941 (2d Cir. 2024), for the proposition that they need not subject themselves to an "unlawful" government policy to establish standing. *See* Dkt. 25 at 8 n.1. But each of those cases are easily distinguishable from this one. As an initial matter, *Cruz* was a motion to dismiss and therefore only addressed the adequacy of the pleadings, not the sufficiency of the evidence. 596 U.S. at 295. Moreover, *Cruz* was a First Amendment challenge to certain federal election regulations and involved monetary penalties for unpaid loans Senator Ted Cruz alleged he was owed by his Campaign Committee. *Id.* at 293-95. The injury was thus monetary and discrete, involving an unpaid sum plus a penalty for which the Government sought collection. *Id.* Plaintiffs have not alleged any constitutional violations here, Dkt. 25, and merely challenge the propriety of the Guidance in the abstract without making any evidentiary showing of injury.

The *Antonyuk* plaintiffs also raised constitutional challenges to a state law that they claimed infringed on their access to concealed carry permits. *See* 120 F.4th at 955-56. The *Antonyuk* plaintiffs moved for a preliminary injunction, challenging the application process as unconstitutional and claiming that the application process itself caused injury. *Id.* at 980 ("An applicant who challenges an *application itself* is not required to first comply with the objected-to component before bringing suit." (emphasis added)). The Second Circuit drew a distinction between claims that challenge "a rule that limits eligibility for a" benefit, as opposed to claims that challenge "a component of the application process itself." *Id.* at 979. With respect to challenges to eligibility requirements, "the Second Circuit has held that as a general matter, to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy unless the plaintiff "makes a substantial showing that application for the benefit . . . would have been futile." *Walker v. N.Y.S. Dep't of Health*, 788 F. Supp. 3d 427, 475 (E.D.N.Y. 2025) (collecting cases). As such, "a plaintiff who fails to submit to the procedural requirements of a law or policy that offers an exemption or other relief from its mandate does not have standing to challenge the restrictions imposed by the law or policy, unless the plaintiff shows that application for the exemption was futile." *Id.* (citation and internal quotations omitted). It is undisputed that Plaintiffs have received an offer of exemption from the Department. *See* SOMF ¶¶ 14, 17, 24. But they have failed to pursue their entitlement to it either by challenging their institutions' alleged denials of such exemption, or by refusing to comply with the eligibility requirement that they must prove their immigration status with evidence from DHS to be eligible for student aid.

Here, unlike in *Antonyuk*, Plaintiffs do not challenge the application process for student aid; rather, they challenge only the regulation that makes them ineligible without documentation from DHS. *See* Dkt. 25 at 9-10 (challenging the "new requirement" that they must provide DHS documentation to be eligible). Plaintiffs do not contest their entitlement to the DHS documentation but instead challenge their ineligibility for student aid based on the lack of documentation of their immigration status. *Id.* Plaintiffs are therefore challenging the underlying eligibility criteria for noncitizens who seek student aid—not the application process itself. Thus, Plaintiffs' case is unlike the facts in either case on which they rely to support standing, and even so, they cannot bootstrap standing on summary judgment just by pleading it in the complaint. *See United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012) (holding that an applicant who challenged the state licensing scheme lacked standing to challenge the scheme because he had not applied for a license).

Plaintiffs ask the Court to assert jurisdiction over a claim for a benefit (student aid), yet they freely admit they have not attempted to comply with the eligibility requirements (DHS documentation). Plaintiffs cannot show futility, because by their own admissions, the requested student aid would likely be approved if they submitted documentation showing their entitlement to aid. These circumstances are insufficient to confer standing. *See, e.g.*, *Wade v. Univ. of Conn.*, 554 F. Supp. 3d 366, 376-78 (D. Conn. 2021) (holding that plaintiffs lacked standing to challenge university vaccine policy where they failed to show they had applied for an exemption and thus could not show the exemption would be futile).

To be sure, Defendants do not suggest that *no plaintiff* could ever show standing to challenge the Guidance, but what is clear is that these Plaintiffs have not met their burden to do so. And ultimately, Plaintiffs' *alleged* injuries are entirely self-inflicted. Plaintiffs could satisfy the Guidance by obtaining the necessary DHS documentation—they simply choose not to. Because this "injury" flows directly from Plaintiffs' own refusal to comply with a process available to them, it does not confer standing. *See, e.g.*, *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (finding plaintiff lacked standing because its injury was "self-inflicted" insofar as it "ha[d] within its grasp an easy means for alleviating the alleged uncertainty"); *Chrysafis v. Marks*, 573 F. Supp. 3d 831, 847-49 (E.D.N.Y. 2021) (denying preliminary injunction where the harm was "self-inflicted" as plaintiffs' "unreasonably chose not to avail themselves" of an "adequate procedural remedy").

B. Plaintiffs' Alleged Injury Cannot Be Attributed to the Department Because Plaintiffs Are Excepted from the Guidance as Past Recipients of Student Aid

To satisfy the traceability requirement of standing, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant." *Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 710

F.3d 71, 84 (2d Cir. 2013) (citing *Lujan*, 504 U.S. at 560). Traceability ensures that a plaintiff's injury is "not the result of the independent action of some third party not before the court." *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 55 (2d Cir. 2016) (citing *Lujan*, 504 U.S. at 560-61).

Plaintiffs' alleged injuries are not traceable to Defendants because Plaintiffs have not shown any causal connection between the Department's actions and their access to student aid. To address the risk of harm, Defendants allowed institutions to exempt Plaintiffs from the Guidance, and Plaintiffs have not shown what, if any, efforts they made to demonstrate to their academic institutions that they qualify for the provided exception. *See generally* Dkts. 25, 34. Because the Guidance permits institutions to except students with prior student aid awards, only the institutions could have denied them access to student aid—not Defendants.[4] Plaintiffs have put forth no evidence that Defendants denied any request for student aid, and their *allegations* merely suggest that their institutions told them they were ineligible for aid absent DHS documentation proving their immigration status (Rourke-Rodriguez and Thompson), or that they simply refuse to comply with the documentation requirement, despite apparent eligibility (Swamp). Dkt. 25 ¶¶ 35-45. Accordingly, Plaintiffs have not and cannot show that their alleged injuries are traceable to Defendants. *See Buckley v. Bassett*, No. 22-CV-1436, 2024 WL 896880, at *14-15 (E.D.N.Y. Mar. 1, 2024) (finding lack of standing where plaintiff failed to show that the alleged injury was traceable to defendants, and facts otherwise indicated the injury was traceable to a non-party); *Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. N.Y.C.*, No. 20-CV-0634, 2021 WL

[4] Notably, the Department does not hold academic institutions responsible for erroneous determinations of aid eligibility for noncitizen students if the institution relied on (i) documentation from the student that DHS "has confirmed the student's immigration status meets the eligibility requirement" for student aid; (ii) documentation of a DHS "determination of the students immigration status"; or (iii) documentation of immigration-status that the institution did not have reason to believe did not support the student's claim of eligibility. *See* 20 U.S.C. § 1091(h); 34 C.F.R. § 668.138 (c), (d).

4198332, at *12 (S.D.N.Y. Sept. 14, 2021) (plaintiffs failed to show that injuries caused by allegedly unconstitutional statute were "fairly traceable" to city because the city did "not enforce" the law—a state statute—"and thus could not possibly cause any [of plaintiffs' alleged] injuries"), *aff'd*, 2024 WL 1061142 (2d Cir. Mar. 12, 2024) (summary order). Accordingly, the Court should dismiss this case for lack of standing and jurisdiction.

II. The Guidance Conforms to the Controlling Statutory and Regulatory Frameworks of the Higher Education Act and the Immigration and Nationality Act

Even if the Court had jurisdiction to reach the merits—which it does not—Plaintiffs' challenge cannot succeed because the Guidance is consistent with applicable law. The Court need look no further than the plain text of the controlling statutes and regulations to conclude that the Department's actions were justified and in no way improper. Where a court determines that statutory language is unambiguous, it must construe the statute according to the plain meaning of its words. *Nwozuzu v. Holder*, 726 F.3d 323, 327 (2d Cir. 2013). "The plain meaning of a statutory provision may be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute." *Williams v. MTA Bus Co.*, 44 F.4th 115, 129 (2d Cir. 2022) (internal quotation marks and citation omitted). Where a court "independently interpret[s] the statute" and concludes that the agency has properly applied the law, it will not set aside the agency's decision. *Loper Bright*, 603 U.S. at 395.

A. The Guidance Falls Squarely Within the Department's Delegated Authority to Protect and Administer the Student Aid Programs

The Secretary of Education is charged with administering federal student aid programs, and with ensuring that such benefits flow only to eligible students. 20 U.S.C. § 1070(b). Congress, through the enactment of the HEA, made clear the desire that the nation's resources not be used to provide student aid to any individual attending an institution of higher education participating in the Title IV aid programs who is not eligible for such aid. *See id*. § 1091(a)(5). The regulations promulgated in furtherance of this requirement under the HEA reflect Congress's desire that "an individual who is not a citizen or national of the United States" must undergo more rigorous verification procedures in order to prevent the undesirable outcome of such aid being distributed to ineligible noncitizens. *See id*. § 1091(g). Thus, the statutory authority underlying the relevant regulations in this case show unequivocally that Congress intended the Department to require additional oversight for individuals who are not citizens of the United States. *Id.*[5]

Plaintiffs incorrectly claim that 34 C.F.R. § 668.33 exceeds the Department's authority under HEA § 1091(a)(5) because the regulation "fails to track the terms of the statute." *See* Dkt. 34-6 at 20. Plaintiffs also erroneously suggest that the regulation is inconsistent with the statute, and that the regulation's requirement that noncitizens must obtain proof of citizenship imposes "a limitation Congress did not authorize and exceeds the agency's authority." *Id.* Plaintiffs further claim that because the Guidance is contrary to the Department's earlier interpretations of its own regulations, "the Department cannot [therefore] rely on its regulations to justify its new policy regarding Jay Treaty students." *Id.* at 21. Each of these arguments fail.

First, the challenged regulation, 34 C.F.R. § 668.33, is not inconsistent with the statute, 20 U.S.C. § 1091(a)(5), nor does it create new requirements that Congress did not intend. Plaintiffs offer no legal authority for their erroneous claim that a regulation must "track a statute" to be valid. *See id.* at 19-21. Nor could any such authority be found because a regulation need not mirror a statute to be valid. If that were the case, regulations would be completely unnecessary. Defendants agree with the general principle that an agency regulation may not *amend* a statute or create rules

[5] It is also significant that the Department employs systems to confirm student aid applicants' immigration status for both citizens and noncitizens alike. *See* SOMF ¶¶ 18-20.

inconsistent with congressional intent. Indeed, that is the very reason the Department adopted the Guidance—to conform agency policy to the existing law and regulation. *See* SOMF ¶¶ 9-12, 16.

The relevant statutes and regulations at issue here are not inconsistent. HEA § 1091(a)(5) unambiguously states that *to be eligible* for aid, "*a student must* . . . be a citizen or national of the United States, a permanent resident of the United States, or able to provide evidence from the [DHS] that he or she is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident." (emphasis added). Plaintiffs acknowledge that "[t]he statute says nothing about how U.S. citizens or permanent residents must document their status in order to receive aid." Dkt. 34-6 at 19. Thus, Plaintiffs' argument is at odds with itself—acknowledging that the statute says *nothing* about a document verification process, while also claiming that the regulation is inconsistent with the Department's authority by creating a verification requirement. Logically, the Department can exceed authority only in two ways: either by creating *new* rules not permitted by statute, or by wielding powers *inconsistent* with the statute. But this is academic because neither problem exists here.

"When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper Bright*, 603 U.S. at 395. Fundamentally, Plaintiffs' argument ignores that Congress expressly empowered the Secretary to implement a verification system to confirm students' eligibility for aid based on immigration status for citizens and noncitizens alike. *See* 20 U.S.C. § 1091(g) (authorizing "verification of immigration status"). The HEA says so explicitly by *mandating* an immigration verification system, as follows:

> The Secretary *shall implement* a system under which the statements and supporting documentation, if required, of an individual

> declaring that such individual is in compliance with the requirements of subsection (a)(5) *shall be verified* prior to the individual's receipt of a grant, loan, or work assistance under this subchapter.

Id. § 1091(g)(1) (emphasis added). The congressional mandate that the Secretary implement an immigration verification system is further supported by the express authorization for the Secretary "to verify such statements and supporting documentation through a data match, using an automated or other system, with other Federal agencies that may be in possession of information relevant to such statements and supporting documentation." *Id.* § 1091(g)(3). Plaintiffs failed to inform the Court of this statutory provision and thus incorrectly claim that Congress did not delegate authority to the Secretary to enforce its eligibility requirements based on immigration status. *See* Dkt. 34-6 at 19-21. In fact, the text of the statute shows Congress not only delegated but also *mandated* the Secretary to enact a robust immigration verification system to prevent ineligible persons from receiving student aid. *See generally* 20 U.S.C. § 1091; *see also* SOMF ¶¶ 18-20.

The circumstances of this case are analogous to previous challenges to the Secretary's authority to require attestations for participation in student aid relevant to registration with the Selective Service System. *See, e.g.*, *Alexander v. Trs. of Bos. Univ.*, 766 F.2d 630, 639 (1st Cir. 1985) (finding that the Department did not exceed its authority in HEA § 484(a)(5) by issuing regulations requiring financial aid applicants to file a statement indicating whether they were exempt from registering for the draft). Nothing in the Guidance prevents Plaintiffs from participating in the federal student aid programs. If Plaintiffs truly qualify as Canadian-born American Indians, they should be able to obtain evidence from DHS of their status "as having been lawfully admitted for permanent residence." 8 C.F.R. § 289.2. Any difficulty that Plaintiffs may face in obtaining such required documentation is outside the scope of this litigation and cannot reasonably be attributed to the Department. *Cf. Alexander*, 766 F.2d at 639 ("In denying plaintiffs benefits, the Secretary is simply saying that if an individual is unwilling to tell the government that he or she fulfills the conditions for aid, the government will not dispense it.").

Finally, by claiming that the Guidance is invalid because it reverses prior Department policy, *see* Dkt. 34-6 at 20-21, Plaintiffs wrongly suggest that an agency cannot revise policy even when the agency determines that its policies do not conform to the law. This claim lacks merit in the face of clear statutory delegation for the Secretary to implement mechanisms to verify students' immigration status before receiving student aid. *See generally* 20 U.S.C. § 1091(a), (g). Plaintiffs' potential reliance interests on prior versions of the FSA Handbook is irrelevant, because the Guidance aligns with the best reading of the controlling statutory and regulatory framework. *See DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 60 (2020) (Thomas, J., concurring in the judgment) (opinion joined by Alito and Gorsuch, JJ.) ("But reliance interests are irrelevant when assessing whether to rescind an action that the agency lacked statutory authority to take. No amount of reliance could ever justify continuing a program that allows [an agency] to wield power that neither Congress nor the Constitution gave it."). Plaintiffs cannot credibly claim the Guidance was an arbitrary or capricious departure from past policy because, regardless of any previous policy, the Guidance fully conforms to the plain text of longstanding law and regulation. *See* 20 U.S.C. § 1091; 34 C.F.R. §§ 668.33(a), 668.130. The Department is not required to perpetuate for Plaintiffs' benefit a practice that is at odds with the existing regulatory scheme. *See Tex. Int'l Airlines v. Civil Aeronautics Bd.*, 458 F.2d 782, 785 (D.C. Cir. 1971) ("Assuming that the Government made a mistake . . . in the application of the regulation, the law does not require the Government to perpetuate the mistake."); *cf. Chem-Haulers, Inc. v. I.C.C.*, 565 F.2d 728, 730 (D.C.

Cir. 1977) ("The mere fact that the Commission may have nodded on one occasion does not entitle a litigant to a repetition of its blunder.").

Ultimately, it is not arbitrary or capricious for an agency to decline to further an incorrect reading of a statute merely because the correct reading of the text comes with some practical costs. *See Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (holding that agency action was not arbitrary or capricious because the agency "determined that the new regulations are more in keeping with the original intent of the statute, are justified by client experience under the prior policy, and are supported by a shift in attitude").

B. The Guidance Does Not Conflict with the Immigration and Nationality Act

Contrary to Plaintiffs' allegations, Dkt. 34-6 at 21-23, the Guidance does not conflict with the INA—it conforms to it, and the Department specifically revised the Guidance to do just that. Plaintiffs incorrectly contend that they are exempt from the HEA's immigration documentation and verification requirements because "they are exempt from the INA." *Id.* at 21. Plaintiffs confuse their broad right to cross the U.S. and Canadian borders without DHS-issued documentation for a blanket exemption of any requirement that they might ever need to prove their immigration status to the U.S. Government. The applicable immigration law, 8 U.S.C. § 1359, codifies the right to free passage of Canadian-born American Indians protected by the Jay Treaty. The statute states that "[n]othing in this subchapter shall be construed to affect the right of American Indians born in Canada to *pass the borders of the United States*," and limits the right of free passage "only to persons who possess at least 50 per centum of blood of the American Indian race." 8 U.S.C. § 1359 (emphasis added). The implementing regulation, 8 C.F.R. § 289.2, adds that Canadian-born American Indians who have "maintained residence in the United States since [their] entry, shall be regarded as having been lawfully admitted for permanent residence." Nothing in these immigration authorities exempts Plaintiffs from producing documentation from the Government sufficient to verify their immigration status to prove eligibility for student aid.

Defendants have no reason to question Plaintiffs' claim that they are eligible for permanent resident status under 8 U.S.C. § 1359, which, subject to verification from DHS, would entitle them to student aid. But even if they are deemed permanent residents under the Jay Treaty, that alone does not suffice to verify their eligibility status for student aid under the HEA. Plaintiffs cannot meet the legal requirements to show they are permanent residents simply because they say so—they must be able to establish such immigration status by presenting the requisite documents from DHS, the department responsible for administering the United States' immigration system. *See* 8 U.S.C. § 1103(a)(1). Plaintiffs' position that they cannot be required to provide evidence to verify their immigration status belies the plain text of the law and longstanding regulation. Plaintiffs' claim of an exemption from proving their immigration status is further belied by the plain text of the HEA and the corresponding regulation that states that "to be eligible to receive" student aid, the applicant must either be a citizen or "provide evidence *from* [DHS]" showing that the applicant is a "permanent resident" or is in the United States "with the intention of becoming a citizen or permanent resident." 34 C.F.R. § 668.33(a) (emphasis added). The unambiguous controlling education and immigration statutes and regulations join to form a simple and sensible rule: noncitizens seeking student aid are required to provide proof of their immigration status from DHS when applying for student aid. This is particularly rational given that "American Indians born in Canada" is a defined term that not all individuals with tribal affiliation may meet. *See* 8 C.F.R. § 289.1. Plaintiffs cite no binding legal authority that rebuts such a rational requirement.

Plaintiffs' reliance on *Akins v Saxbe*, 380 F. Supp. 1210 (D. Me. 1974), for the proposition that American Indians born in Canada are "exempt . . . from all immigration restrictions imposed by the [INA]," is misplaced. *See* Dkt. 34-6 at 22-23. Aside from the fact that *Akins* is nonbinding district court authority from *over 50 years ago*, the narrow holding of the opinion is easily distinguishable. In relevant part, *Akins* involved a challenge to a government policy requiring American Indians born in Canada to comply with certain registration and reporting requirements if they desired to stay in the United States for more than 30 days. *Akins*, 380 F. Supp. at 1214. The *Akins* court acknowledged that the plain text of 8 U.S.C. § 1359 was unambiguous, stating "[c]oncededly, the normal import of a right 'to pass' does not encompass a right 'to remain,' and, concededly, Congress knows the English language." *Id.* at 1219. Even so, based on a review of the legislative history and two principles of statutory construction, the court declined to follow the plain text, concluding instead that "the words 'to pass' are not to be given either a literal or a technical construction and that Section 1359 exempts these Indians from the restrictions imposed on aliens by the immigration laws." *Id.* at 1221. The *Akins* plaintiffs challenged *immigration* requirements that limited their ability to remain in the United States for a certain period of time. It was the fact that the challenged restrictions threatened their presence and passage into the United States that drove the *Akins* court's decision. *Id*. at 1214, 1218-21. The holding in *Akins* was narrowly limited to plaintiffs' challenge against the specific immigration requirements imposed on the plaintiffs in that case. *Id.* at 1221-22.

No such immigration restrictions are implicated here, as this case only concerns acceptable verification of immigration status through DHS as a prerequisite to student loan eligibility under the HEA. Indeed, unlike *Akins*, this case has nothing to do with Plaintiffs' right to cross the border or remain in the United States whatsoever. Nor does it involve a challenge to any "restriction" imposed by immigration laws on crossing into or remaining in the United States, like the visa and registration requirements that were challenged in *Akins*. Rather, this case involves noncitizen

Plaintiffs who claim entitlement to federal student aid without any verification of their immigration status by DHS. Plaintiffs have not been asked to apply for a visa or registration as a prerequisite or condition of entry into the United States. Plaintiffs seek a public benefit under the HEA, for which their eligibility depends on verification of their immigration status. Therefore, *Akins* is neither binding nor persuasive authority supporting Plaintiffs' claims. *See Craghtten v. United States*, No. 24-CV-409, 2025 WL 1886708, at *6-7 (D. Id. Jan. 31, 2025) (dismissing claims for alleged violation of 8 U.S.C. § 1359 because the government form requiring plaintiff to obtain an alien registration number from USCIS to purchase a firearm did not "interfere with plaintiff's right to pass the borders of the United States"), *appeal docketed*, No. 25-2117 (9th Cir. Mar. 28, 2025); *Bey v. Westbury Union Free Sch. Dist.*, No. 21-CV- 2048, 2022 WL 900615 at *8 (E.D.N.Y Mar. 28, 2022) (dismissing alleged violation of 8 U.S.C. § 1359 because allegations "relate to revocation of his teaching license, not passage over the Canadian border or losses that he sustained during the Revolutionary War"); *MacDonald v. United States*, No. 11-CV-1088, 2011 WL 6783327, at *5 (S.D. Cal. Dec. 23, 2011) (finding plaintiff's status as a Canadian-born American Indian did not exempt him from judicial bar against aliens suing to challenge removal under 8 U.S.C. § 1252(g)).

Plaintiffs claim that since "no change in the law" has occurred, the Guidance is "nothing more than a bureaucratic fiat issued by DHS and followed by the Department." Dkt. 34-6 at 23. This hyperbolic charge ignores the plain text of existing law and regulation, and the Guidance itself, which explicitly states that revisions were required to conform Department's policy to the *existing law*. *See* SOMF ¶¶ 9-12, 16. Whether an unlawful policy lasts two days or two centuries is irrelevant—what matters is that it was unlawful and must be corrected. Government practice—whether longstanding or novel—does not constitute, and cannot "supersede," the law. *Loper Bright*, 603 U.S. at 386. Rather, courts must "independently interpret the statute and effectuate the will of Congress," thereby "uphold[ing] the traditional conception of the judicial function." *Id*. at 395–96; *see also Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 329 (2015) ("[A] long-established practice does not justify a rule that denies statutory text its fairest reading.").

Defendants do not deny or diminish the fact that Plaintiffs, depending on the independent actions of their academic institutions, and other similarly situated individuals might have to do more to collect the necessary documentation to show entitlement to student aid under the Guidance than was previously required. But the fact that Plaintiffs might have benefited from less demanding verification measures under previous Department policy does not justify continuing a policy that is inconsistent with the statute. *See Regents of the Univ. of Cal.*, 591 U.S. at 60.

III. The Guidance Was Lawfully Issued in Accordance with Required Regulatory Process

A. The Challenged Guidance Is an Informal Interpretive Rule That Does Not Require Notice and Comment

Next, Plaintiffs wrongly allege that the Guidance is "fatally flawed" because it "is a legislative rule issued without notice and comment." Dkt. 34-6 at 24-26. Plaintiffs again resort to hyperbolic allegations of malfeasance when they opine that the Department "simply overlooked Jay Treaty students" when its rules were first promulgated. *Id.* at 24. They suggest that "rather than going through the bother of amending the regulations," the Department simply resorted to a "procedural shortcut" to relieve "the affected parties – the Jay Treaty students – of an unlawful obligation and provided a practical solution." *Id.* Plaintiffs' theories are wrong and plainly belied by the Administrative Record in this case.

First, the challenged Guidance amounts to an interpretive rule, not a legislative rule as Plaintiffs claim. An agency need not conduct notice and comment rulemaking to issue or amend interpretive rules. 5 U.S.C. § 553(b)(3)(A). "[T]he critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015). "A legislative rule is one that has legal effect or, alternately, one that an agency promulgates with the intent to exercise its delegated legislative power by speaking with the force of law." *Lin Liu v. Smith*, 515 F. Supp. 3d 193, 199 (S.D.N.Y. 2021) (citing *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 83 (D.C. Cir. 2020)). By contrast, an interpretive rule "is one that derives a proposition from an existing document, such as a statute, regulation, or judicial decision, whose meaning compels or logically justifies the proposition." *Id.* Thus, "an interpretive rule, instead of creating legal effects, thus puts the public on notice of pre-existing legal obligations or rights." *Id.*; *see also Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) ("An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.").

The Second Circuit Court of Appeals has referred to a "comprehensive test" to determine whether a rule is interpretive or legislative:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

Sweet v. Sheahan, 235 F.3d 80, 91 (2d Cir. 2000) (citing *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)).

Each of these questions are answered in the negative in this case. The Department's FSA Handbook for 2024-2025, and the January 15, 2025, electronic announcement, each provided informal interpretive guidance to students and academic institutions about the Department's policy regarding the documentation requirements for Jay Treaty students. *See* SOMF ¶ 15. The Guidance was fully consistent with preexisting law and regulation, was not published in the federal register, did not invoke general legislative authority, and did not amend a prior legislative rule. The Guidance notified the public of a change in the Department's previous (but erroneous) interpretation of *existing* law and regulations. *Id.* ¶ 16. It is clear from the face of the existing regulation that *all* noncitizens were required to "provide evidence *from* [DHS]" of their immigration status to be eligible for aid even *before* the Guidance was issued. *See* 34 C.F.R. § 668.33(a) (emphasis added). As Plaintiffs acknowledge, the applicable laws and regulations predate the Guidance. *See* Dkt. 34-6 at 25. And as a general matter, neither the annual FSA Handbook (the 2024-2025 version or any other version), nor the electronic announcement from January 15, 2025, were required to go through notice and comment rulemaking because they merely interpret existing regulations and provide informal guidance to assist borrowers and institutions navigating the student aid process. *See* SOMF ¶¶ 9-12, 14-16.[6]

Further, the fact that previous Department guidance documents (earlier FSA Handbooks) took a different position on the issue of immigration verification does not alter the administrative process necessary to issue a new interpretive rule. *See Perez*, 575 U.S. at 103 (rejecting the argument that changes in agency interpretation trigger the need for notice and comment, and stating an agency may "change its interpretation if the revised interpretation is consistent with the

[6] Plaintiffs' reliance on *Make the Road New York v. Pompeo*, 475 F. Supp. 3d 232 (S.D.N.Y. 2020) and *Mendoza v. Perez*, 754 F.3d 1002, (D.C. Cir. 2014), is misplaced. Both cases are inapposite because each involved changes to agency policy that the courts found to be contrary to pre-existing regulations. This case presents just the *opposite* situation: the prior policy was erroneous, and the agency merely changed its interpretive guidance to *conform* its policy to pre-existing law and regulation. Plaintiffs rightly admit that the HEA "says nothing about *how* U.S. citizens and permanent residents must document their status," and that the current regulation, 34 C.F.R. § 668.33(a)(2), specifically requires "permanent residents to *prove their status* through documentation from [DHS]." Dkt. 34-6 at 19-20 (emphasis added).

underlying regulations”). Notably, prior versions of the FSA Handbook that superseded the 2024-25 FSA Handbook were likewise issued without notice and comment. Plaintiffs ask the Court to mandate the Department to revert back to the prior policy under previous Handbooks they prefer, but that would contradict Plaintiffs’ own theory that the 2024-2025 Handbook was not supported by proper administrative process. *See* Dkt. 34-6 at 25 (requesting that the 2024-2025 Handbook be “set aside” in favor of the old policy due to insufficient notice and comment, but requesting reversion to the previous policy, which they acknowledge also was not issued through notice and comment rulemaking). Notably, Plaintiffs do not suggest that those prior versions of the FSA Handbook were procedurally invalid.

In sum, the Guidance did not require notice and comment under the APA, and the Department’s issuance of the Guidance satisfied the requirements for interpretive rules. *See Lin Liu*, 515 F. Supp. 3d at 198-200 (distinguishing between interpretive and legislative rules and determining that the State Department’s Foreign Affairs Manual was interpretive because it was not published din the federal register and the guidance did not amend prior legislative rules); *Almakalani v. McAleenan*, 527 F. Supp. 3d 205, 221-22 (E.D.N.Y. 2021) (concluding that department guidance was “clearly a policy statement that explains how the agency will exercise its discretion, rather than a rule that alters regulated parties’ rights and obligations”).

B. The Guidance Was Well-Supported by a Published Rationale and Is Otherwise Justified as an Appropriate Step to Conform Agency’s Policy to the Law

Finally, perhaps anticipating the weakness of their own argument, Plaintiffs allege that even if the Court concludes the Guidance was interpretive (which it should), the Department failed to provide “any rationale or justification for its radical change in policy” *See* Dkt. 34-6 at 26. This is incorrect. Although Plaintiffs claim that the Department’s electronic announcement from January 2025 was “perfunctory” and void of any “reasoned explanation,” the Court need only look to the Guidance itself. The January 2025 announcement expressly stated that the Guidance was issued "after consultation" with DHS to identify "acceptable documentation for confirming the Title IV eligibly of American Indians born in Canada." *See* SOMF ¶¶ 9-12. Plaintiffs point to evidence outside the Administrative Record from 1998, in which the Department correctly recognized Jay Treaty students' "unique" immigration status. Dkt. 34-6 at 26-27, Dkt. 34-2 at 3. But prior Department interpretation of the applicable statutes and regulations is immaterial because the Department's current Guidance fully comports with the law. Plaintiffs' own arguments admit that the Department policy was contrary to existing regulation under 34 C.F.R. § 668.33(a)(2), *see* Dkt. 34-6 at 20, but then suggest that the Department should be enjoined from updating its prior interpretations as long as such interpretations benefit them, *see id.* at 26-27.

Not only does the Guidance conform to the law, but it makes good sense. Neither the Department nor the thousands of educational institutions in the United States are equipped with either the ability or access to verify any given applicant's *potential* immigration status. As announced in the electronic announcement in January 2025, the Handbook was rolled out in February 2024 as the result of the Department's routine inter-agency clearance process in which the Department received feedback from DHS. *See* SOMF ¶¶ 8-10. The Department reviewed the DHS feedback with the relevant implementing regulations and correctly determined that the policy should include a list of documentation *from* DHS that students could use to prove eligibility for aid. *Id.* Thus, the facts and governing regulation rebut Plaintiffs' claim that Defendants did not offer "good reasons" for the Guidance.[7]

[7] Plaintiffs point to *New York v. Department of Homeland Security*, 408 F. Supp. 3d 334, 349 (S.D.N.Y. 2019), Dkt. 34-6 at 27, for the proposition that the Guidance is "simply a new agency policy" without support in immigration law, but that case is clearly distinguishable because it involved a challenge to a change in DHS regulations that established wholly new criteria for determining whether a noncitizen is likely to become a "public charge." *See* 408 F. Supp. 341-42, 346-48. This case is about education law, and unlike *New York v. DHS*, involves no change or challenge to any agency regulations at all.

The facts also do not support Plaintiffs' allegations that the Guidance was "abrupt," "radical," and simply "new" policy. The Department published the Guidance in February 2024—over one year before Plaintiffs Rourke-Rodriguez and Swamp had initially claimed they "and other tribal members first learned of" the documentation requirements. *See* SOMF ¶¶ 1, 15-17; Dkt. 2-3 at ¶ 28. Plaintiffs all received federal student aid prior to the 2025-2026 award year. *See* SOMF ¶ 21. Moreover, the electronic announcement that Plaintiffs attack was issued in January 2025, which, regardless of its grandfathering and general favorability towards Plaintiffs' position as prior aid recipients, would have provided them with ample time to comply with the challenged requirements before the 2025-2026 award year.

The Department's issuance of updated guidance for Canadian-born American Indians to participate in the federal student aid programs was not procedurally defective because both Guidance documents provided explicit rationale for the changes. *See* SOMF ¶¶ 9-12, 15-17. Under the arbitrary or capricious standard, an agency's decision is presumed valid, and a court reviews only whether that decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Volpe*, 401 U.S. at 416, *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). This review is "deferential," *Dep't of Com. v. New York*, 588 U.S. 752, 773 (2019), and simply examines whether the agency's decision "was the product of reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). Moreover, "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Id.* at 43. Because the Department's revised interpretations of the controlling law were both reasonable and rationally explained, *FCC v. Prometheus Radio Project*, 592 U.S. 414, 417 (2021),

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Nor could a serious challenge be levied where the Department's position is fully consistent with its longstanding regulation. *See* 34 C.F.R. §§ 668.33, 668.130, 668.133.

they satisfy the deferential "arbitrary and capricious" standard. *See Strickland v. Comm'r, Maine Dep't of Human Servs.*, 48 F.3d 12, 18 (1st Cir. 1995) (noting that "an explained modification, even one that represents a sharp departure from a longstanding prior interpretation, ordinarily retains whatever deference is due" (citations omitted)); *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Com'n*, 59 F.3d 284, 291 (1st Cir. 1995) ("[A]ny such alteration or reversal must be accompanied by some reasoning-some indication that the shift is rational, and therefore not arbitrary and capricious." (cleaned up)).

The 2024-2025 FSA Handbook, in response to edits by DHS, correctly updated the Department's guidance to institutions of higher education to accurately reflect what "proof from the student [may be submitted] that USCIS or CBP has determined that the student meets the requirements of INA 289." *See* SOMF ¶¶ 8-10. This meets the APA requirements that an agency action be reasonable and reasonably explained. Further, the January 15, 2025 electronic announcement was even more expansive than the Department's position articulated in the 2024-2025 FSA Handbook. *See* SOMF ¶¶ 14-17; *see also* Dkt. 33 at 3 (Jan. 15, 2025, FSA Electronic Announcement), 53-54 (2024-2025 FSA Handbook). The January 2025 announcement more explicitly noted that "[a]fter consultation with the Department of Homeland Security (DHS) about acceptable documentation for confirming the Title IV eligibility of American Indians born in Canada (formerly Jay Treaty students), FSA updated the acceptable documentation in the 2024-25 FSA Handbook." *Id.* ¶ 14; Dkt. 33 at 3 (Jan. 15, 2025, FSA Electronic Announcement), 53-54 (2024-2025 FSA Handbook). In response to concerns transmitted to FSA staff from institutions of higher education regarding certain students who had previously been deemed eligible as Canadian-born American Indians, the announcement highlighted existing regulatory flexibility by noting that "institution[s] may elect under 34 CFR 668.133(b) to not require such a student to submit additional immigration documentation to establish their title IV eligibility where the documents used to establish that eligibility have not expired, and where the institution does not have reason to believe that the student's claim of citizenship or immigration status is incorrect." SOMF ¶¶ 13-14. The announcement provided additional instructions for how Canadian-born American Indians could obtain evidence of their qualifying status, explaining that "to obtain acceptable documents a prospective student may request documentation by appointment directly with the U.S. Citizenship and Immigration Services: https://my.uscis.gov/en/appointment/v2." *Id.* ¶ 14; Dkt. 33 at 3 (Jan. 15, 2025, FSA Electronic Announcement). The analysis contained in both the 2024-2025 FSA Handbook and the January 15, 2025 announcement was thus reasonable and reasonably explained for purposes of the APA's deferential arbitrary and capricious standard. Each document set forth the Department's best interpretation of how lawful permanent residents under the INA may provide the Department with evidence of their qualifying status, and rooted the basis for those interpretations in the existing regulatory framework for determining eligibility to participate in federal student aid. The APA requires no more.

IV. The Amicus Curiae's Arguments Are Unavailing and Do Not Alter the Result

Finally, although Defendants take no position on whether the Court should accept the proposed amicus curiae brief of the Mohawk Council of Akwesasne ("MCA"), Dkt. 35, the arguments presented therein merely restate Plaintiffs' position, and thus, cannot change the result. *See United States v. El–Gabrowny*, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994) ("The usual rationale for amicus curiae submissions is that they are of aid to the court and offer insights not available from the parties."). MCA wrongly argues that "Defendants' attempt to require Plaintiffs to submit to federal immigration registration requirements violates Plaintiffs' rights, protected by statute, 8 U.S.C. § 1359, to pass the borders of the United States." Dkt. 35-2 at 3. MCA's arguments are improper because they are identical to those advanced by Plaintiffs, which all fail for the reasons explained above. Like Plaintiffs, MCA wrongly conflates the Jay Treaty's border passage privileges for Canadian-born American Indians with the reasonable requirement *under education law* that the Department must verify the immigration status of all applicants for student aid. *See supra* at Argument section II(B). The fact that Plaintiffs might be *deemed* permanent residents is irrelevant to their obligation under education law to produce evidence *from* DHS sufficient to confirm that status and thus their eligibility for student aid. *Id.*

Like Plaintiffs, MCA also relies on *United States ex rel. Diabo v. McCandless*, 18 F.2d 282 (E.D. Pa. 1927), and *Akins v Saxbe*, 380 F. Supp. 1210 (D. Me. 1974), which are inapposite because unlike those cases, this case is unrelated to Plaintiffs' rights to cross the border freely and remain in the United States. *See id.* MCA presents argument on issues that are not in dispute—the parties agree that the Jay Treaty provided certain Canadian-born American Indians with special privileges to cross the U.S.-Canadian border unimpeded. *See supra* at Argument section II(B); Dkt. 34-6 at 21-22. In fact, MCA's description of the McCandless and Akins cases further highlights that those cases concerned the right to cross the border and not a requirement to document immigration status for purposes of receiving public benefits like student loans. See Dkt 35-2 at 3-8.

MCA wrongly suggests that the Jay Treaty's privileges should be expanded beyond the context of border crossing and claim that Plaintiffs cannot be "required to obtain green cards," *see* Dkt. 35-2 at 8-11, but the Jay Treaty's privileges are specific to border crossing, and courts have consistently rejected overexpansive interpretations of the Jay Treaty outside the intended historic purpose. *See, e.g.*, *Craghtten*, 2025 WL 1886708, at *6; *Bey*, 2022 WL 900615, at *8. The Guidance does not implicate any border crossing rights and does not require Plaintiffs to do anything more than meet their statutory obligation to verify their immigration status to receive aid. *See supra* at Argument, section II.

Finally, MCA inaccurately equates the Guidance to an "immigration registration" requirement, but that mischaracterizes the congressional intent that all borrowers—citizen and noncitizens alike—must establish their eligibility for student aid based on immigration status. 20 U.S.C. § 1091(a)(5). MCA also ignores Congress' express mandate that the Secretary "shall implement a system" sufficient "to verify such [immigration] statements and supporting documentation," including through verification by "other Federal agencies," like DHS, "that may be in possession of information relevant to such statements and supporting documentation." *Id.* § 1091(g)(1), (3). MCA and Plaintiffs ask the Court to endorse an outcome that would divest the Department of its duty to verify borrowers' eligibility with evidence from responsible federal agencies. The plain text of the controlling law and regulations foreclose such a result.

CONCLUSION

For the reasons stated above, the Guidance was properly issued, consistent with the controlling law, and was duly executed well within the Department's authority under applicable law. Therefore, Defendants' motion for summary judgment should be granted, Plaintiffs' motion denied, and judgment entered for Defendants as a matter of law.

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