IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST IMMIGRANT RIGHTS PROJECT, Plaintiff, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, Defendant.	)	Case No. 19-cv-03283-RDM

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiff Northwest Immigrant Rights Project hereby moves for summary judgment on the ground that there is no genuine dispute as to any material fact and plaintiff is entitled to judgment as a matter of law.

In support of this motion, plaintiff submits the accompanying Memorandum in Support of Plaintiff's Motion for Summary Judgment; Declaration of Jorge L. Barón; Declaration of Rebecca Smullin; and a proposed order.

Dated: December 12, 2019

Respectfully submitted,

/s/ Rebecca Smullin
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MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Each year, individuals submit millions of applications or petitions to defendant U.S. Citizenship and Immigration Services (USCIS) for immigration benefits that can transform their lives. USCIS adjudicates petitions and applications for naturalization, lawful permanent residence, employment authorization, humanitarian benefits, and other forms of legal status and authorizations. These benefits allow individuals to work and live legally in the United States, receive protection from dangerous circumstances, or vote and participate fully in American society as citizens.[1]

Applications for USCIS benefits can be expensive, costing hundreds of dollars for certain filings. *See* 8 C.F.R. § 103.7(b). USCIS, however, has long waived some of its expensive fees for individuals who are unable to pay. *See id.* §103.7(c).

In October 2019, USCIS introduced a new standard for waiving fees. Although it did not formally amend its fee-waiver regulation, it narrowed the criteria for establishing eligibility by amending its fee-waiver form and that form's instructions, retiring a 2011 memorandum that outlined its earlier practice, and revising its Policy Manual. Prior to these changes, USCIS permitted individuals to establish eligibility by showing that, based on their low income or limited resources, they received benefits from another government agency. Through the 2019 revisions to its form, USCIS has eliminated this straightforward application criterion and restricted fee waivers

[1] *See generally* USCIS, *2018 USCIS Statistical Annual Report* (2019), https://www.uscis.gov/sites/default/files/USCIS/statistics/2018_USCIS_Statistical_Annual_Report_Final_-_OPQ_5.28.19_EXA.pdf; USCIS, *Number of Service-Wide Forms Fiscal Year-to Date, by Quarter, and Form Status, Fiscal Year 2019* (2019), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY19Q3.pdf.

to individuals who can establish, using evidence specified in the new materials, that their income is below a certain ceiling or that they face hardship. USCIS has also restricted applicants to certain types of evidence, mandating, in many cases, that applicants obtain documents from the Internal Revenue Service (IRS) to establish their fee-waiver eligibility. Collectively, these changes to the fee-waiver standard make applying for a fee-waiver a more uncertain, burdensome, and lengthy process. The standard also impinges on individuals' access to immigration benefits and the advantages that come with them.

USCIS's changes to the fee-waiver standard are procedurally and substantively unlawful. USCIS failed to observe the rulemaking requirements of the Administrative Procedure Act (APA) and the Paperwork Reduction Act (PRA) requirements regarding agency collections of information. Moreover, USCIS's October 2019 fee-waiver actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Court should hold USCIS's actions unlawful and set them aside.

STATEMENT OF FACTS

I. USCIS fee and fee-waiver authority

The Immigration and Nationality Act (INA) states that "fees for providing adjudication and naturalization services may be set at a level" that ensures full cost recovery, 8 U.S.C. § 1356(m), but acknowledges the importance of fee waivers and exemptions. It recognizes that services may be "provided without charge to asylum applicants or other immigrants," *id.*, requires the Department of Homeland Security (DHS) to allow individuals seeking certain humanitarian benefits to apply for fee waivers, *see id.* § 1255(*l*)(7), and exempts other categories of individuals from certain fees, *see id.* § 1439(b)(4).

Pursuant to the INA, USCIS, an agency within DHS, has adopted a regulation that establishes both a fee schedule and a framework for fee waivers and exemptions. *See* 8 C.F.R. § 103.7(b)-(d); *see* 84 Fed. Reg. 26137, 26138 (June 5, 2019). Under this schedule, USCIS charges $1,140 to apply to become a lawful permanent resident; up to $640, plus an $85 biometrics fee, to apply for naturalization; more than $400 to request employment authorization or replace a permanent resident card; $675 for certain appeals; and $930 to apply for a waiver of inadmissibility, which is often necessary for certain humanitarian visas. *See* 8 C.F.R. § 103.7(b)(1)(i)(C), (G), (P), (S), (U), (II), (BBB); AR2192, 2841, 5252.[2] The principal fee-waiver regulation, however, allows USCIS to waive listed fees if the requester is "unable to pay" and waiver "is consistent with the status or benefit sought." *Id.* § 103.7(c)(1). Section 103.7(d), not at issue here, permits the USCIS director to provide other waivers or exemptions.

Because of the high cost of USCIS fees, waivers can be essential for low-income individuals seeking reasonable access to vital immigration benefits. For a low-income individual,

[2] The administrative record has not yet been filed in this case. Cites to the "AR" refer to the certified administrative record filed in *City of Seattle v. DHS*, No. 3:19-cv-07151-MMC (N.D. Cal. filed Oct. 29, 2019). That record was filed in three volumes, ECF Nos. 48-3 through 48-5. The index is at ECF No. 48-2. USCIS stated that the *City of Seattle* filings are the record for two of the actions at issue in this case: the October 24, 2019 versions of the I-912 form and instructions and the "corresponding … revisions to the USCIS Policy Manual." Certification of the Administrative Record, at 2, *City of Seattle v. DHS*, No. 3:19-cv-07151-MMC (N.D. Cal. Nov. 20, 2019), ECF No. 48-1. Further, USCIS stated that the filings constitute the record for an October 25, 2019 policy alert announcing USCIS's decision to supersede past policy memoranda, which would include the 2011 memorandum, the withdrawal of which is also challenged in this action. *See id.*; AR484. After this motion is fully briefed, plaintiff's counsel will coordinate with defendant's counsel to prepare and file a joint appendix containing copies of the portions of the administrative record that are cited or otherwise relied upon, in accordance with Local Civil Rule 7(n) and this Court's standing order.

an application fee can require weeks' worth of wages or cost more than the applicant's savings. *See* AR2116, 2175, 2578-79, 2305, 2388-89, 2629, 2770, 4009. Disabled individuals and survivors of domestic violence or human trafficking eligible for certain humanitarian benefits, among others, can face particularly severe financial limitations. *See* AR2815-17, 3937, 3304, 5080, 5021, 5058, 5236. Without waivers, therefore, USCIS fees may deter individuals from seeking immigration benefits at all. *See generally* AR2387, 2547, 2728 (citing research suggesting that naturalization fees deter individuals from applying).

DHS has repeatedly recognized this dynamic. In 2010, when setting fees lower than the current ones, DHS explained that it allowed USCIS fee waivers and certain fee exemptions "so that certain populations do not choose to not request benefits to which they may be entitled because of the fee." USCIS Fee Schedule, 75 Fed. Reg. 58962, 58972 (Sept. 24, 2010). When it adopted the current fee schedule in 2016, DHS again explained that it offered fee waivers and limited the increase of certain USCIS fees because it recognized "the potential impact of fee increases on low-income individuals." USCIS Fee Schedule, 81 Fed. Reg. 73292, 73297 (Oct. 24, 2016). *See generally id.* at 73294-95 (showing increases in fees, from 2010 schedule).

For an individual to forgo a benefit application because he or she cannot afford to pay the USCIS fee can have significant consequences. For certain refugees, asylees, and others, delaying naturalization can mean losing a lifeline because Supplemental Security Income, which aids disabled, blind, and older individuals with limited income, is available for only a limited period of

time if the individual does not naturalize. *See* AR2116, 3311.[3] Moreover, an individual who delays naturalizing because of an inability to pay the fee will miss voting in elections, being able to serve on juries, and other rights and advantages of citizenship. *See* AR2577, 2728, 2771-72, 2802. And individuals who cannot afford to replace lawful permanent resident cards or seek other documentation may be unable to prove their lawful status and right to work to employers or immigration enforcement officials, *see* AR1206, 2387-88, 3339, or put themselves in legal jeopardy, as it can be a crime for a legal permanent resident to not carry a valid permanent resident card, *see* 8 U.S.C. § 1304(e); 81 Fed. Reg. at 73304 (explaining this provision).

A delay in seeking humanitarian benefits can likewise cause harm, making a survivor of domestic violence, human trafficking, or other crimes suffer longer at the hands of an abuser or unable to transition to a stable life in the United States. The humanitarian benefits that USCIS adjudicates include those under the Violence Against Women Act (VAWA), a framework allowing individuals to seek lawful permanent residence without having to rely on their abusers. USCIS also grants T and U visas, which provide protections to victims of human trafficking and other crimes. *See generally* 8 U.S.C. §§ 1101(a)(15)(T), (a)(15)(U), (51).[4] Individuals seeking to escape

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[3] *See generally* 8 U.S.C. § 1612(a)(2)(A); Soc. Sec. Admin., *Spotlight on SSI Benefits for Aliens—2019 Edition*, https://www.ssa.gov/ssi/spotlights/spot-non-citizens.htm (last visited Nov. 26, 2019).

[4] *See generally* USCIS, *Green Card for VAWA Self-Petitioner* (Jul. 26, 2018), https://www.uscis.gov/green-card/green-card-vawa-self-petitioner; USCIS, *Victims of Human Trafficking & Other Crimes* (Aug. 25, 2017), https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes. The applications for certain humanitarian benefits do not themselves have fees. But ancillary forms, such as waivers of inadmissibility filed with applications and renewals of work authorizations, do have fees. *See* AR2192, 2841, 5252; *see also, e.g.*, 8 C.F.R. §§ 214.11(d)(2)(iii), 214.14(c)(iv) (regarding waivers of inadmissibility); *id.* §§ 214.11(d)(11), 214.14(c)(7) (regarding replacement or renewal of employment authorization).

abuse or trafficking through these protections cannot gain (or maintain) the right to work and financial independence if they cannot afford to apply for initial benefits or renew their work authorizations. *See generally* AR2192, 2465, 2467, 2711, 2814-17, 3276-77. Further, victims of trafficking or crimes, who initially receive four-year visas, jeopardize their status if they cannot afford to apply for lawful permanent residence before the end of that period. *See* 8 U.S.C. § 1184(o)(7)(A), (p)(6); AR2841.

To avoid the consequences of not applying for the immigration benefits for which they are eligible, immigrants may decide to pay USCIS fees even when they cannot reasonably afford them. Such a choice can have its own damaging effects. Like other expenses unaffordable to low-income individuals, a costly immigration fee can force individuals to trade-off immigration applications for necessities such as medical care, utilities, or food. *See* AR2249-50, 2388-89, 2467, 2839, 3160.

For individuals seeking fee waivers to avoid such choices, the timing of a fee-waiver application is important. Individuals submit fee-waiver requests with their underlying benefits applications, and USCIS's practice is to return the underlying application if it denies a fee-waiver request. An individual can re-submit the underlying application, but USCIS considers the application's filing date to be the date of the re-submission, which might be after an applicable deadline. Thus, for example, an immigrant facing a February 15 deadline may miss the filing deadline if she submits her application in January but USCIS does not process and deny her fee-waiver request until February 16. Any re-submission of the benefits application would be untimely. *See* AR451 (stating that if USCIS denies a fee waiver, it will "instruct" the applicant "to file a new application"); *see generally* AR2240, 2473, 2821 n.29, 2842; Barón Dec. ¶ 23.

II. USCIS's fee-waiver practice, 2011-2019

In 2011, USCIS issued a memorandum ("2011 Memorandum") regarding the agency's implementation of 8 C.F.R. § 103.7(c) on fee waivers. *See* AR43-50 ("Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule; Revisions to Adjudicator's Field Manual (*AFM*) Chapter 10.9 (*AFM* Update AD11-26)"). The 2011 Memorandum included the text of what would be a revised chapter 10.9 in USCIS's Adjudicator's Field Manual. *See* AR45; *see generally* USCIS, *Adjudicator's Field Manual-Redacted Public Version*, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html (last visited Dec. 2, 2019) (describing manual).

The 2011 Memorandum explained that a "fee-waiver request may be granted when USCIS has determined that the individual is unable to pay the fee," AR47, and that, "[i]n general," USCIS would review fee-waiver requests "by considering, in a step-wise fashion," whether the applicant fell into one of three eligibility categories, AR44. First, USCIS would consider whether the individual was receiving a means-tested benefit: Medicaid, food assistance under the Supplemental Nutrition Assistance Program, or some other benefit for which eligibility and/or the amount are based on the recipient's "income or resources." AR47. If the individual was receiving such a benefit, "the fee waiver [would] normally be approved." *Id.*[5] If an applicant did not establish

[5] The agency's practice of accepting proof of means-tested benefits to establish fee-waiver eligibility had begun as early as 2009, when a USCIS ombudsman explained that the agency used means-tested benefits to establish eligibility because they "represent[] another agency's independent assessment of [the individual's] economic circumstances." AR3220-21 & n.5 (quoting USCIS, *CIS Ombudsman Teleconference: Fee Waivers: How Are They Working for You, September 30, 2009* (Mar. 9, 2018), https://www.uscis.gov/archive/archive-outreach/cis-ombudsman-teleconference-fee-waivers-how-are-they-working-you-september-30-2009).

eligibility in that manner, USCIS would consider whether household income was at or below 150 percent of the federal poverty guidelines. *See* AR48. If the individual's household income satisfied the standard, "the fee waiver [would] normally be approved." AR49. Finally, if an individual did not establish eligibility based on the means-tested benefit or income criterion, USCIS would consider whether the individual was "under financial hardship … that renders the individual unable to pay the fee." AR49.

Even with this rubric, USCIS allowed substantial flexibility in how individuals could establish their inability to pay fees. For instance, the agency adopted a fee-waiver request form, labeled the I-912 form, but, noting that "use of a USCIS-published fee-waiver request form is not mandated by regulation," the agency stated that it would consider requests that "compl[ied] with 8 CFR 103.7(c)," even if they did not use the form. AR44. Similarly, although the I-912 form's instructions listed types of additional documentation that were permissible, *see* AR173-74, the 2011 Memorandum recognized a wide range of options for documents that could be used to show income or hardship, including statements from an employer and tax returns, AR48-50, and stated that USCIS could approve fee-waiver requests without such documentation, if applicants otherwise established that they were unable to pay fees, AR46-47. Further, for individuals using the I-912 form, the instructions specified that family-related applications could be combined into a single fee-waiver form. *See* AR170.

The 2011 Memorandum's first method of establishing eligibility—means-tested benefits—was the easiest, most reliable, and most common method used. A single document from the benefits-granting agency was usually sufficient, and USCIS reliably granted such applications on the first submission. *See* AR1183, 2045, 2352, 2386, 2530, 2572, 2955, 2958, 3219, 3121, 3226, 3229; Barón Dec. ¶ 15; *see also* AR172 (instructions of former, optional I-912 form). A 2017

USCIS study showed that among granted fee-waiver requests, 71.9 percent established eligibility using means-tested benefits. *See* AR324.

Fee-waiver applications based on income or hardship, by contrast, generally took longer to prepare, had a higher rate of denial, and more frequently required re-submission. Practitioners often included documentation to support such applications, and still found the outcome uncertain. *See* AR2233, 2342, 2530, 2572, 2958, 3214, 3226, 3276, 3229-30; Barón Dec. ¶¶ 16, 21. A 2017 USCIS study showed that income was used to establish eligibility for 26.9 percent of fee waivers granted; hardship established eligibility in less than two percent of cases. *See* AR324.

III. USCIS's October 2019 actions

A. USCIS's new fee-waiver requirements

On October 24, 2019, USCIS adopted a new fee-waiver standard (hereafter, the 2019 Standard) through revised versions of the I-912 form and the form's instructions. *See* Smullin Dec., Ex. A (October 24, 2019 I-912 Form), Ex. B (October 24, 2019 I-912 form instructions). The new form and instructions created a mandatory, narrowed eligibility standard that terminated USCIS's practice under the 2011 Memorandum, effective December 2, 2019. *See* AR484. First, the 2019 Standard restricted fee waivers to individuals who can satisfy one of two criteria: Either their "documented household income" must be at or below 150 percent of the federal poverty guidelines, or they must "demonstrate financial hardship including, but not limited to, medical expenses of family members, unemployment, eviction, victimization, and homelessness." Smullin Dec., Ex. B at 1. Second, the 2019 Standard required individuals to use the I-912 form to apply for fee waivers and to do so individually, rather than combining family members' related applications into one. *See id.* Third, the 2019 Standard imposed evidentiary requirements. *See id.* at 1, 6-7, 8-9. Fourth, the 2019 Standard conditioned fee waivers on applicants providing other information

that was not previously required, such as answers to questions about whether they and their family members filed tax returns, and if not, why. *See* Smullin Dec., Ex. A at 3; AR411.

The 2019 Standard's new evidentiary requirements are significant. To establish income eligibility, in particular, the 2019 Standard generally requires individuals to obtain tax transcripts or other documentation from the IRS regarding themselves and their household members. *See* Smullin Dec., Ex. B at 6, 7. Even individuals without income or unable to provide proof of income generally must seek IRS documents to comply with the new Standard; it mandates that such individuals submit "documentation from the IRS that indicates no tax transcripts and no W-2s were found," as well as descriptions "in detail" of their situations. *Id.* at 6. Additionally, applicants who reside in U.S. territories or who worked in a foreign country must obtain and submit tax transcripts from those jurisdictions in certain cases. *See id.* at 6. Further, the Standard requires individuals to obtain and submit documentation of financial support not reflected on IRS documents. For instance, individuals must document any support from adult children, child support, or pensions. *See id.* at 7-8. Copies of tax returns and pay stubs, on the other hand, generally do not satisfy the 2019 Standard. *See id.* at 6-8.

The 2019 Standard provides alternative documentation requirements for some individuals who have or are applying for VAWA benefits or T- or U- nonimmigrant status. If these individuals lack income or proof of income "due to [their] victimization," they do not have to provide otherwise-required income documentation, but they are required to "substantiate" their inability to pay and inability to obtain required evidence and "provide any available documentation of … income, such as pay stubs or affidavits from religious institutions, non-profits, or other community-based organizations verifying that [they] are currently receiving some benefit or support from that entity and attesting to [the applicants'] financial situation." *Id.* at 8, 9.

On October 25, 2019, USCIS posted the new I-912 form online, and released a policy alert and press release that announced additional changes that would take effect on December 2, 2019. First, USCIS would stop applying the 2011 Memorandum to new fee-waiver applications. *See* Press Release, USCIS, *USCIS Updates Fee Waiver Requirements* (Oct. 25, 2019), https://www.uscis.gov/news/news-releases/uscis-updates-fee-waiver-requirements (announcing USCIS would cease applying Adjudicator's Field Manual section 10.9, contained in 2011 Memorandum); AR484 (Policy Alert, similar). Second, USCIS revised its Policy Manual, a document binding on USCIS officers. The revision added chapters 3 and 4, regarding fees and fee waivers, to volume I, part B, of the manual, to supersede sections 10.9 and 10.10 in the Adjudicator's Field Manual and related material. *See* Press Release; AR484 (policy alert); AR491-514 (new material); USCIS, *Policy Manual*, https://www.uscis.gov/policy-manual (with "About the Policy Manual").

USCIS's October 25, 2019 Policy Manual revision reflects key aspects of the 2019 Standard, but also includes directions to USCIS officers that go beyond the mandates of that standard (as well as the content of the superseded documents). For example, the new material directs USCIS officers on adjudicating fee-waiver applications, *see* AR508-10, and states a newly worded interpretation of 8 U.S.C. § 1255(*l*)(7), requiring DHS to permit fee-waiver applications from individuals seeking certain humanitarian benefits. *See* AR499; *compare id.* with AR43-50.[6]

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[6] On December 9, 2019, the U.S. District Court for the Northern District of California issued a nationwide preliminary injunction against USCIS's implementation or enforcement of its October 2019 fee-waiver revisions, as announced in USCIS's October 25, 2019 press release, and reflected in the October 24, 2019 versions of the I-912 form and its instructions; the October 25, 2019 revision to chapters 3 and 4 in the USCIS Policy Manual, volume 1, part B; and USCIS's October 25, 2019 Policy Alert. *See* Civil Minutes, *City of Seattle*, No. 3:19-cv-07151-MMC (N.D. Cal. Dec. 9, 2019), ECF No. 59 (reflecting oral ruling); Order Granting Plaintiffs' Motion for

B. USCIS's Paperwork Reduction Act process

USCIS was required by the PRA to obtain approval from the Office of Management and Budget (OMB) for USCIS's revisions to its fee-waiver information collection, reflected in the new I-912 form and its instructions. *See generally* 44 U.S.C. § 3507(a)(2); 5 C.F.R. § 1320.5(a)(2), (g). As part of the PRA process, USCIS published three information-collection notices seeking comment on its proposal to change the I-912 form and its instructions and rescind the 2011 Memorandum. *See* Revision of a Currently Approved Collection: Request for Fee Waiver; Exemptions, 83 Fed. Reg. 49120 (Sept. 28, 2018); Revision of a Currently Approved Collection: Request for Fee Waiver, 84 Fed. Reg. 13687 (Apr. 5, 2019); Revision of a Currently Approved Collection: Request for Fee Waiver; Exemptions, 84 Fed. Reg. 26137 (June 5, 2019). Then, on October 16, 2019, USCIS submitted its proposal to OMB for approval. *See* AR461. USCIS's submission included three documents styled as responses to public comments received in response to each of the three PRA notices. *See* AR242-49 (Sept. Resp.), 314-29 (Apr. Resp.), 397-406 (June Resp.).[7] It also included a "Supporting Statement" with estimates of the information collection's

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Nationwide Preliminary Injunction, *City of Seattle* (N.D. Cal. Dec. 11, 2019), ECF No. 65 (written order).

[7] USCIS's April and June 2019 notices requested comments to be sent to OMB, *see* 84 Fed. Reg. at 13687, 26138, but the administrative record in *City of Seattle* shows that USCIS received and reviewed those comments as well, *see* Index of Certified Administrative Record 2, 3, *City of Seattle* (N.D. Cal. Nov. 20, 2019), ECF No. 48-2. USCIS published its first set of responses to comments in a public docket around the same time that its April information-collection notice was published in the Federal Register. *See USCIS Responses to Public Comments on I-912 Revision 60-Day Federal Register Notice*, Regulations.gov (Apr. 5, 2019), https://www.regulations.gov/document?D=USCIS-2010-0008-1243. The responses to comments received on the April and June notices, items 23 and 29 in the administrative record, were posted online only with the OMB submission. They were posted in spreadsheet format, with these two headings: "All Comments & Responses, 84FR13687" and "All Comments & Responses, 84FR26137." *See* OMB, *ICR Documents,* https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201910-1615-

burden and other information. *See* AR450-60; *see generally* OMB, *ICR Documents*, https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201910-1615-006 (last visited Dec. 2, 2019) (OMB submission). On October 24, 2019, OMB approved the revised I-912 form and instructions. *See* AR461.[8]

Meanwhile, on October 2, 2019, about two weeks before it submitted the 2019 Standard for OMB review, USCIS submitted to OMB a proposed rule regarding USCIS fees. *See* OMB, *OIRA Conclusion of EO 12866 Regulatory Review* (Nov. 1, 2019), https://www.reginfo.gov/public/do/eoDetails?rrid=129627. Published in the Federal Register a few weeks later, the proposal seeks to raise fees substantially—in some cases, by 100 percent of more. USCIS Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62280, 62280, 62326 (proposed Nov. 14, 2019). At the same time, the proposal seeks to limit fee-waiver eligibility, by rule, with changes similar to (but more severe than) those reflected in the 2019 Standard. Specifically, the proposal would limit fee waivers to individuals with household income at or below 125 percent of the federal poverty guidelines; require individuals to use a USCIS form for fee-waiver requests and establish their eligibility with tax transcripts or other specified evidence; and restrict the types of forms and categories of individuals eligible for fee

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006 (last visited Dec. 2, 2019). For ease of reference, plaintiff cites both the AR and the number of the row in the spreadsheet, as posted online.

[8] OMB concluded that USCIS had not complied with the Government Paperwork Elimination Act, which regards agencies' acceptance of electronic submissions and signatures, *see* Pub. Law. No. 105-277, div. C, tit. XVII, 112 Stat. 2681, 2681-749 (1998); 44 U.S.C. § 3504 note. Due to the GPEA non-compliance, OMB provided PRA approval that lasts for two years and required that, before resubmitting the form for renewed approval, USCIS should update OMB on its efforts to reduce the burden of the I-912 form's filing. *See* AR461.

waivers. *See id.* at 62298-301, 62363. Neither USCIS's information-collection notices nor its public submission to OMB regarding the 2019 Standard mentioned this concurrent effort to change the fee-waiver standard.

IV. The harm resulting from the October 2019 fee-waiver actions

The 2019 Standard harms individuals seeking immigration benefits—a result that commenters emphasized over and over in responding to USCIS's PRA notices. At the very minimum, the 2019 Standard makes fee-waiver applications more burdensome and time-consuming. In many circumstances, the new requirements could mean weeks more of delay, hours more of time, and many additional challenges in seeking fee waivers, particularly for individuals who could earlier have established their eligibility solely by showing their receipt of means-tested benefits. Further, the 2019 Standard increases the risk of denials, by using terms that USCIS could apply in unexpected ways. Combined, the extended work required to apply for a fee waiver and the increased risk of denial mean that individuals may be less likely than before to receive fee waivers and, therefore, the immigration benefits they seek.

First, the 2019 Standard harms individuals by eliminating the 2011 Memorandum's most straightforward application criterion—means-tested benefits—and imposing evidentiary requirements for income- or hardship-based applications. With these two changes, the 2019 Standard makes compiling an application a substantially more time-consuming process for many individuals. *See generally* AR2116, 2791, 3223, 3233. In most circumstances, income applicants will have to obtain documents about themselves from the IRS. *See* Smullin Dec., Ex. B at 6. Additionally, individuals may have to work with family members to collect those individuals' tax transcripts; reach out to religious or nonprofit organizations to seek affidavits; search for proof of assets, liabilities, and expenses; or track down other documentation. Identifying and obtaining such

documentation can be especially challenging, time-consuming, or costly for individuals with limited English proficiency, limited flexibility in their schedule, unstable living situations, or other difficulties reaching outside organizations. *See*, *e.g.*, AR2233-34, 2743, 3212-13, 3305, 3351, 5085.

Obtaining a single IRS document, in particular, can be a slow and challenging process. The IRS offers transcripts and verifications of non-filing online, but only to individuals with mobile phones and financial accounts in their name, Social Security numbers or tax identification numbers, the same mailing address as the IRS has on file, and English proficiency, as well as internet access. Individuals who are elderly, disabled, homeless, or survivors of domestic abuse, among others, are likely to lack the required accounts, stable mailing addresses, or other requisites—while also facing financial limitations that may be particularly severe. And although individuals can seek documents from the IRS by mail, that process requires anywhere from several days to six weeks or more, especially for individuals who have moved since they last filed taxes and thus need to change their address with the IRS before seeking a transcript. *See* AR3119, 3340-3345; *see also supra* pp. 4; AR522, 2102, 2329-30, 2548-49, 2769, 3254; Barón Dec. ¶ 30; IRS, *Welcome to Get Transcript* (Sept. 10, 2019), https://www.irs.gov/individuals/get-transcript (regarding requirements and timeline for transcripts by mail); IRS, *Get Transcript FAQs* (Nov. 15, 2019), https://www.irs.gov/individuals/get-transcript-faqs (discussing English-only access to online form, as well as address-change process and the wait-time required). Individuals seeking to escape abusers could also face challenges in finding a secure mailing address to receive documents. *See* AR2235, 3343, 5043; *see also* AR5092 (noting that recent IRS changes mean that third-parties often cannot receive tax transcripts). And for individuals without Social Security numbers or individual taxpayer identification numbers, the process would be even longer; they would first

need to obtain a number, which can involve its own paperwork burden and delay. *See* AR2235, 3341-42, 3344. The wait for an IRS document could also become lengthier, if the IRS is not prepared for the requests that the 2019 Standard will generate. *See generally* AR2549, 2730. And USCIS can draw the process out even more, since the 2019 Standard allows USCIS to ask an applicant to provide a certified copy of an IRS transcript, after the applicant has already submitted his or her application. *See* AR2469; Smullin Dec., Ex. B, at 6.

Other factors may further increase the burden of applying for a fee waiver under the 2019 Standard. First, completing an I-912 form for each family member requires more time than submitting applications without the form or combining related applications into one. *See* AR3233, 4302. Second, the 2019 Standard may result in longer USCIS review times, because applications will generally be required to include more—and more complex—documentation than benefits-based applications would previously. *See* AR2116, 2530, 2742, 2791. Third, individuals may have a harder time finding assistance with fee-waiver applications because completing them takes more time, and legal service providers will not be able to serve as many clients as they could previously. Providers that used workshop models to assist many individuals at once will need to change their operations to provide the personalized type of assistance that the 2019 Standard necessitates. *See* AR2293, 2328-29, 2553-54, 2729-30, 2741, 3233-34, 3256-57, 3286-87, 3307-08.

As a result of these effects, the 2019 Standard jeopardizes individuals' ability to receive fee-waivers—or the immigration benefits they seek. Individuals may not be able to compile all the required documentation in time or accurately, particularly when filing deadlines are short. *See* AR2116, 2322, 2466; *see also* AR2841-42 (noting six-month and 30-day deadlines for certain applications); AR3348 (similar). More generally, if compiling and adjudicating a fee-waiver application takes more time, individuals face greater risks of missing filing dates for immigration

benefits, due to unexpected fee-waiver denials that USCIS processes only *after* filing deadlines pass. *See* AR2841-42, 3160, 3276.

The 2019 Standard exacerbates these problems by relying on terms that create uncertainty about what applicants must do to satisfy the Standard, and thus whether USCIS will grant any particular application. *See generally* Barón Dec. ¶ 33. The 2019 Standard does not explain, for example, what individuals must show about their "victimization" to justify alternative requirements and includes other ambiguities about the scope of the allowance for individuals with (or seeking) VAWA benefits or T- or U-visas. *See* AR3309-10, 3341, 5290. The term "hardship" is also undefined under the 2019 Standard; USCIS does not make clear which individuals with household income over 150 percent of the federal poverty guidelines will qualify for fee waivers and which will not. *See* AR2234, 5295. And because USCIS's instructions do not match the terms used by the IRS, the 2019 Standard leaves open questions about which forms individuals must obtain from the IRS. *See* AR3344, 3345.

The USCIS Policy Manual revision also adds to the risk that USCIS will deny fee-waiver applications submitted under the 2019 Standard. The new material creates uncertainty about the standard by stating an interpretation of 8 U.S.C. § 1255(*l*)(7), regarding fee waivers related to humanitarian benefits, without making clear its meaning or the extent to which USCIS intends to change agency practice. *See* AR499; Barón Dec. ¶ 35. Further, the new material prohibits USCIS officers from issuing requests for evidence (RFEs). *See* AR508. RFEs are a tool that USCIS can use to ask applicants to submit additional documentation, rather than denying a request. *See generally* AR3230; *cf.* 8 C.F.R. § 103.2(b)(8)(ii) (discussing RFEs generally); Barón Dec. ¶ 34. Without them, USCIS may deny applications with easily cured deficiencies.

V. Plaintiff Northwest Immigrant Rights Project

Plaintiff Northwest Immigrant Rights Project (NWIRP) is a nonprofit legal services organization founded in 1984 to defend and advance the rights of immigrants. To further its mission, NWIRP provides direct legal representation to low-income immigrants, offers know-your-rights presentations for community members and trainings for other service providers, and provides consultations to unrepresented individuals in detention. Barón Dec. ¶¶ 2-3.

In its direct-representation work, NWIRP prioritizes serving individuals who are in vulnerable circumstances or who face complex legal issues. For example, NWIRP helps survivors of domestic and sexual violence and other crimes gain access to humanitarian protections. Principally, NWIRP represents these individuals in filing applications and petitions for VAWA-related benefits, T- and U- visas, employment authorization, and lawful permanent residence. NWIRP also helps individuals seeking citizenship, many of whom have a disability, are homeless, have limited English proficiency, are elderly, or face other circumstances that complicate the naturalization process. *See id.* ¶¶ 5-7.

Many NWIRP direct-representation clients seek waivers of USCIS fees, and when NWIRP helps clients apply for USCIS benefits, it also assists those clients with associated fee-waiver applications. *Id.*¶¶ 10-12. Before USCIS's October 2019 fee-waiver actions took effect, NWIRP prepared fee-waiver applications using the framework in the 2011 Memorandum. *See id.* ¶ 13. It routinely helped clients prepare fee-waiver requests based on their receipt of means-tested benefits. In these cases, NWIRP would advise clients receiving such benefits to bring documentation to their appointments, and NWIRP staff could use this documentation to prepare a fee-waiver application in a matter of minutes. *See id.* ¶¶ 14-15. NWIRP also prepared income- and hardship-based fee-waiver applications without the evidence required by the 2019 Standard. NWIRP often

included copies of individuals' tax returns, pay stubs, individual statements or other documentation with such applications, but it generally did not direct clients to obtain IRS tax transcripts. *See id.* ¶¶ 16-18. Further, NWIRP submitted some fee-waiver applications without the I-912 form and sometimes combined family members' related fee-waiver applications into one. *See id.* ¶¶ 19-20.

USCIS's October 2019 fee-waiver actions make the fee-waiver process more time-consuming, lengthy, and uncertain for many of the clients that NWIRP serves, as described more fully in the attached Declaration of Jorge L. Barón. Many of NWIRP's clients are in vulnerable circumstances that make them particularly likely to face delays and challenges in obtaining the required documentation. *See id.* ¶¶ 6-8, 30; *see supra* pp. 15-16. Additionally, the terms used in the 2019 Standard and other aspects of USCIS's fee-waiver actions mean that clients will face additional uncertainty about what is needed to satisfy the 2019 Standard, whether USCIS will grant their applications, and the timeline required for a favorable adjudication. *See* Barón Dec. ¶¶ 16, 21, 29-36, 42. These dynamics, as explained above, can jeopardize both individuals' access to fee waivers and their access to immigration benefits. *See supra* pp. 3-6, 16-17. Barón Dec. ¶¶ 21, 23, 34, 39-40. As a result, USCIS's October 2019 fee-waiver actions conflict with NWIRP's mission of defending and advancing the rights of immigrants.

NWIRP will take a number of steps to counteract these effects. First, to address the 2019 Standard, NWIRP will devote more time to helping clients collect, review, and prepare required documentation and application forms, as explained in more detail in the Barón Declaration. *See* Barón Dec. ¶¶ 29-32, 39. NWIRP will also spend more time counseling clients on the 2019 Standard and the uncertainties created by USCIS's October 2019 fee-waiver actions, as well as helping clients answer the 2019 Standard's questions about tax filing. Further, it anticipates

spending more time re-submitting applications. *See id.* ¶¶ 39. As a result of all these changes, NWIRP will not be able to help the same number of clients as it could previously. *See id.* ¶ 40.

Second, NWIRP will advance the USCIS fees of certain individuals who might otherwise seek waivers. Specifically, NWIRP will help clients who are facing urgent immigration deadlines, who are unable to proceed with their USCIS applications if they must pay application fees, and for whom NWIRP is worried that, based on the 2019 Standard, a fee-waiver application may be denied and cause the applicant to miss the underlying benefit's filing deadline. *See id.* ¶¶ 41-43.

Finally, to address the harm caused by USCIS's October 2019 fee-waiver actions, NWIRP will divert more resources to its external education efforts and internal training. NWIRP staff have already modified the organization's community-education materials, and they will continue to adjust those and NWIRP's external training materials to describe USCIS's new fee-waiver standard and the agency's implementation of it. NWIRP will also devote more time to training its own staff and outside organizations on fee-waiver issues. *See id.* ¶¶ 44-45.

LEGAL STANDARD

Under the APA, a "reviewing court shall … hold unlawful and set aside agency action," 5 U.S.C. § 706, that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A), or "without observance of procedure required by law," *id.* § 706(2)(D). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "When a plaintiff challenges an agency's final action under the [APA], summary judgment is the mechanism for deciding whether as a matter of law an agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Council of Parent Attorneys &*

Advocates, Inc. v. DeVos, 365 F. Supp. 3d 28, 47 (D.D.C. 2019) (citation and internal quotation marks omitted).

ARGUMENT

I. The 2019 Standard is unlawful because it is a legislative rule issued without notice-and-comment rulemaking.

The APA requires an agency to undertake notice-and-comment rulemaking to issue a new substantive, or legislative, rule. *See* 5 U.S.C. § 553; *Mendoza v. Perez*, 754 F.3d 1002, 1020-21 (D.C. Cir. 2014). Because USCIS failed to do so here, the 2019 Standard is unlawful.

Legislative rules are those "that carry the force of law." *Batterton v. Marshall*, 648 F.2d 694, 701 (D.C. Cir. 1980). Their touchstone is that they "grant rights, impose obligations, or produce other significant effects on private interests." *Id.* at 701-02. That is the case here. The 2019 Standard dictates—and narrows—USCIS's substantive fee-waiver eligibility criteria. *See* Smullin Dec., Ex. B at 1. As explained above, such criteria affect not only the USCIS fees that individuals face, but also their access to immigration benefits that can provide permission to work, legal status, or citizenship. *See supra* pp. 1, 3-6. Indeed, in its November proposal to change its fee schedule and the fee-waiver eligibility standard, USCIS acknowledged that "[l]imiting fee waivers may adversely affect some applicants' ability to apply for immigration benefits." 84 Fed. Reg. at 62333.

The 2019 Standard is thus akin to other substantive rules. It is analogous to two types of substantive parole rules: those establishing "formalized criteria … to determine whether claims for relief are meritorious," *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974), and parole hearing regulations "likely to produce parole decisions different from those which alternatives would be likely to produce," *id.* at 1114. It is also comparable to "a new method for

determining the one undefined variable in [a] statutory fund allocation formula." *Batterton*, 648 F.2d at 708; *see id.* at 705-08 (concluding that APA requirements apply).

Moreover, USCIS has shown that it intends the 2019 Standard to have "the force and effect of law … in the adjudicatory process." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (citation and internal quotation marks omitted). The new I-912 form's instructions conclusively direct that to receive a fee waiver, an individual must satisfy the Standard's requirements. *See* Smullin Dec., Ex. B at 1. Further, the agency described the 2019 Standard as "abrogating the means tested benefit prong for fee waiver eligibility," AR243 (Sept. Resp. ¶ 3)—a description reflecting the agency's definitive abandonment of prior approaches.

USCIS's November 2019 proposed rule also confirms that notice-and-comment rulemaking was necessary to adopt the 2019 Standard. That proposal seeks to change fee-waiver eligibility criteria in a manner similar to the 2019 Standard. *See supra* pp. 13-14. If, on October 2, when USCIS submitted the proposal to OMB, the agency concluded that notice-and-comment rulemaking was necessary to create binding restrictions on fee-waiver eligibility, then USCIS must have intended the same effect for the similar change in the 2019 Standard, submitted to OMB days later. *See* OMB, *OIRA Conclusion of EO 12866 Regulatory Review* (Nov. 1, 2019), https://www.reginfo.gov/public/do/eoDetails?rrid=129627 (regarding submission of November proposal); AR461 (regarding submission of 2019 Standard).

Nonetheless, USCIS has suggested that the 2019 Standard is exempt from APA rulemaking requirements because it is "an interpretive rule and procedural rule." AR242 (Sept. Resp. at ¶ 3). Although procedural rules or interpretative rules can be issued without notice-and-comment procedures, these exceptions to the APA's requirements "must be narrowly construed," *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989), and "recognized only reluctantly," *Nat'l*

Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982) (internal quotation marks and citation omitted). Neither exception applies here.

First, the 2019 Standard is not a procedural rule because it is not "primarily directed toward improving the efficient and effective operations of an agency." *Mendoza*, 754 F.3d at 1023 (citation omitted). Instead, the 2019 Standard "alter[s] the rights or interests of parties," *id.* (citation omitted), by establishing eligibility criteria, as described above, and is thus comparable to other rules deemed legislative, not procedural: "when railroads are directed to file proposed schedules of rates and tariffs with subscribers; when applicants for food stamps are subject to modified approval procedures; when drug producers are subject to new specifications for the kinds of clinical investigations deemed necessary to establish the effectiveness of drug products prior to FDA approval; and when motor carriers are subject to a new method for paying shippers," *Batterton*, 648 F.2d at 708 (footnotes omitted); *see also Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1051 (D.C. Cir. 1987) (holding that enforcement plan was procedural rule, but noting that notice-and-comment would be required if agency had "inserted a new standard of review governing … scrutiny" or "inserted a presumption of invalidity when reviewing certain operations").

This conclusion is confirmed by the seriousness of the 2019 Standard's impact. "[G]rave" effects tip the scales toward the conclusion that a rule is substantive, rather than procedural, because they mean that "notice and comment are needed to safeguard the policies underlying the APA." *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 5-6 (D.C. Cir. 2011) (citation omitted). Here, because fee waivers affect individuals' access to life-changing benefits, "the change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." *Id.* at 6 (concluding that "privacy, safety, and efficacy" concerns meant that a rule on airport screening technology "has the hallmark of a substantive rule"); *see also*

Jafarzadeh v. Nielsen, 321 F. Supp. 3d 19, 46-47 (D.D.C. 2018) (holding that "substantive effect" of a rule that "could spell the difference between retaining and losing the right to remain in this country" weighs against applying the procedural rule exception).

Second, the 2019 Standard is not correctly characterized as "interpretive." While a legislative rule "effects a substantive regulatory change," *Mendoza*, 754 F.3d at 1021 (citation omitted), an interpretive rule simply "describes the agency's view of the meaning of an existing statute or regulation," *id.* (citation omitted); it "derive[s] a proposition from an existing document whose meaning compels or logically justifies the proposition," *id.* (citations and internal quotation marks omitted). That is not true here. Rather than explaining an existing statutory or regulatory term, the 2019 Standard imposes new requirements.

Although USCIS asserted that the 2019 Standard regards the regulatory phrase "unable to pay," 8 C.F.R. § 103.7(c)(1)(i), *see* AR242 (Sept. Resp. ¶ 3), the record shows that the 2019 Standard is "based on something" else. *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 238 (D.C. Cir. 1992) (holding that directives on abortion counseling were legislative when they "themselves suggest[ed] that [they were] motivated not by an interpretation of the regulation's terms, but instead by a [different] previously unacknowledged concern"). In adopting the 2019 Standard, USCIS did not draw any connection between the fee-waiver criteria and immigrants' ability to pay USCIS fees. Instead, it repeatedly referenced other factors. The first two Federal Register notices stated only that USCIS was concerned that states' eligibility standards for means-tested benefits might vary; they did not address the extent to which individuals in *any* state can afford USCIS fees or relate USCIS's proposal to any measure of affordability. *See* 83 Fed. Reg. at 49121; 84 Fed. Reg. at 13687. USCIS's third Federal Register notice suggested that the agency wanted to reduce the volume of fee waivers and was concerned about the fees paid by

individuals *not* seeking waivers. Again, it did not address whether or when immigrants can afford to pay USCIS fees. *See* 84 Fed. Reg. at 26138-39. Thus, this case is not one in which an agency's "entire justification" for a rule was "comprised of reasoned statutory interpretation, with reference to the language, purpose, and legislative history of" the relevant provision. *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (holding rule to be interpretive); *cf. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. FHA*, 151 F. Supp. 3d 76, 92 (D.D.C. 2015) (holding that rule exempting products from an earlier "Buy America" rule was legislative, when reasoning did not tie the exemption to rationales of earlier rule and provided only "terse[]" justifications).

Moreover, the 2019 Standard "cannot fairly be seen as interpreting" the phrase "unable to pay," *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010). An interpretation of "unable to pay" that encompasses individuals suffering hardship, but not anyone else earning over 150 percent of the federal poverty guidelines, does not "flow fairly from the substance of" the regulatory phrase, *id.* (citation omitted). The pertinent regulation, 8 C.F.R. § 103.7(c)(1)(i), does not indicate a method of distinguishing families earning 150 percent of the poverty guidelines from those earning "just a hair" more, and USCIS has provided none. *Catholic*, 617 F.3d at 496 (holding that requirements for certain insurers' costs to be reimbursable constitute a legislative rule in part because the rule includes 10 percent thresholds for certain types of investments made by those insurers and "it is impossible to give a reasoned distinction between numbers just a hair on the OK side of the line and ones just a hair on the not-OK side" (citation omitted)). Further, the phrase "unable to pay" does not "compel[] or logically justif[y]" the conclusion that an individual must prove his or her circumstances with one set of evidence but not another, *Mendoza*, 754 F.3d at 1021 (quoting *Catholic*, 617 F.3d at 494). "The short of the matter is that there is no way an

interpretation of ['unable to pay'] can produce the sort of detailed—and rigid" requirements in the 2019 Standard. *Catholic*, 617 F.3d at 496 (holding that rule setting out "detailed—and rigid—investment code" for entities whose charges to hospitals are reimbursable is legislative, not an interpretive rule interpreting a "reasonable costs" requirement).

Thus, USCIS was required to use APA notice-and-comment rulemaking to adopt the 2019 Standard. Because it failed to do so, the Court should declare the 2019 Standard unlawful.

II. The 2019 Standard is arbitrary and capricious.

The 2019 Standard is also arbitrary and capricious for several reasons, any one of which is a basis for setting it aside under 5 U.S.C. § 706(2)(A).

Under the APA, agencies must provide reasoned analysis for their actions, even without notice-and-comment rulemaking. An "agency must examine the relevant data and articulate 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. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted). When changing position, an agency must "display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (internal quotation marks and citation omitted).

Agency action is arbitrary and capricious if it fails to meet these standards. *See Encino*, 136 S. Ct. at 2125-26. Thus, action contravenes the APA if the agency "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," *State Farm*, 463 U.S. at 43. Similarly, agency action is arbitrary and capricious when

the agency does not "reasonably reflect upon the information contained in the record and grapple with contrary evidence," *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017), or "respond meaningfully to objections raised by a party," *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011) (internal quotation marks and citation omitted).

A. USCIS relied on shifting, illogical, and unsupported justifications.

USCIS failed to provide a reasoned justification for the 2019 Standard. Over the course of its Federal Register notices and its responses to comments, USCIS provided a series of shifting explanations and justifications. And even with multiple bites at the apple, USCIS provided partially inaccurate, incomplete, and unsupported assertions.

USCIS's vacillating and incomplete explanations began in its Federal Register notices. The September 2018 notice stated, inaccurately, that "[t]he proposed revision would reduce the evidence required for Form I-912," by "no longer requir[ing] proof of whether or not an individual receives a means-tested benefit." 83 Fed. Reg. at 49121. In fact, even at that stage, USCIS was seeking to increase, rather than decrease documentation requirements, and had never *required* proof of means-tested benefits from individuals submitting income- or hardship-based applications. *See generally* AR43-50 (2011 Memorandum); AR215, 228-35 (showing changes proposed with September 2018 notice).

The September 2018 notice went on to state that "USCIS has found that the various income levels used in states to grant a means-tested benefit result in inconsistent income levels being used to determine eligibility for a fee waiver," and that, "[t]herefore, the revised form will not permit a fee waiver based on receipt of a means-tested benefit, but will retain the poverty-guideline threshold and financial hardship criteria." *Id.* But it did not provide supporting analysis or explain

other aspects of the agency's proposal. USCIS's second PRA notice relied on statements similar to the first notice's. *See* 84 Fed. Reg. at 13687.

In its third PRA notice, USCIS took a different approach. It described the proposed fee-waiver changes as "removing the means-tested benefit as a criterion in [the agency's] fee waiver request determinations, requiring the submission of Form I-912 to request a fee waiver, and clarifying what the evidentiary [sic] that will be considered for a fee waiver." 84 Fed. Reg. at 26138. And it provided a new reason for the proposed I-912 changes: "[c]urtailing the rising costs of fee waivers." *Id.* at 26139. It stated that "USCIS has determined that without changes to fee waiver policy it will continue to forgo increasing amounts of revenue as more fees are waived. As a result, USCIS expects that DHS will be required to increase the fees that it charges for benefit requests for which fees are not waived." *Id.* at 26138. Again, USCIS provided no supporting data and did not explain all aspects of the agency's proposal.

In its responses to comments, USCIS shifted course again. Invoking an amalgam of macroeconomic and other factors, it spun out a variety of other, often illogical, reasons for the 2019 Standard. For instance, it stated:

> USCIS believes that the continued increase in fee waivers while the economic [sic] and incomes continues [sic] to grow, and unemployment decreases, coupled with the strong desire of commenters for us to retain the means tested benefit policy, are all indicators that means tested benefits are too easy to obtain for them to be good indicators of true inability to pay a USCIS fee.

AR323 (Apr. Resp. at row 71); *see also* AR314 (Apr. Resp. at row 10) (similar); AR397, 403 (June Resp. at rows 9, 49) (similar). At another point, it stated:

> Categorical eligibility for a fee waiver for means tested benefit recipients has caused fee revenue losses from fee waivers to increase. USCIS notes that [the U.S. Department of Agriculture] has noted a similar problem with the eligibility requirements for its Supplemental Nutrition Assistance Program (SNAP), resulting in significant variation across states in the SNAP eligibility determination process, and in program rules and

> operations. ... The determination and decision by USDA is important in this context because many USCIS fee waiver requests are accompanied by a letter from USDA approving SNAP benefits.

AR323 (Apr. Resp. at row 72); *see also* AR404 (June Resp. at row 56) (similar). USCIS also asserted:

> Many applicants have requested a fee waiver based on the receipt of public benefits that are not means tested. In addition … [a]s the eligibility criteria varies by state, there is not a consistent standard for applying the local cost of living into their public benefits determination. This would require USCIS to review all public benefit requirements to determine whether it is a means-tested benefit, how the public benefit granting agency made their calculations, whether they took the local cost of living into consideration, and whether their requirements meet USCIS' determination of the inability to pay. …

AR323 (Apr. Resp. at row 70).

USCIS made no attempt to reconcile these various statements. Instead, when reflecting criticisms of its earlier statements, it responded by substituting other rationales. *See, e.g.*, AR244 (Sept. Resp. ¶ 5) (responding to first round of comments by stating that USCIS has to determine whether a benefit is means tested); AR314 (Apr. Resp. at row 10) (setting out criticism of USCIS's earlier response, and responding by asserting another reason to eliminate benefits-based requests); *see also* AR323 (Apr. Resp. at rows 71, 72, 73) (recognizing criticism of agency's reference to consistent standards, and responding with multiple other assertions about why the 2019 Standard is necessary).

In effect, the agency created a shell-game of reasons. Such a jumble of attempted justifications can hardly be characterized as "reasoned explanation." *Encino Motorcars*, 136 S. Ct. at 2125.

Even considered individually, USCIS's multiple attempts to justify the 2019 Standard fall short of APA requirements. USCIS did not identify any "rational connection[s]" between the agency's elimination of benefits-based applications and the macroeconomic and fee-waiver trends

it cites—or even establish that the cited circumstances exist. *State Farm*, 463 U.S. at 43. The record contains no data on macroeconomic trends and no data on fee-waiver application practices; USCIS's own data about the volume of fee waivers granted in recent years undermine the claim that the dollar volume of fees waived is increasing. *See* AR405 (June Resp. at row 73).[9]

Further, although USCIS suggested that the new fee-waiver eligibility restrictions were necessary to avoid fee increases, *see* 84 Fed. Reg. at 26138, it later stated that it had no idea whether the 2019 Standard would have such effect, *see* AR398, 399, 405 (June Resp. at rows 17, 21, 71, 72). *Cf. Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1113-14 (D.C. Cir. 2019) (holding order arbitrary and capricious when the agency "pointed to no record evidence" that the order would "incentivize" a certain market reaction and failed to address "comments and evidence that undercut its conclusion"). And even that statement is undermined by USCIS's November 2019 proposal, which would narrow the fee-waiver standard even more, but still increase fees significantly. *See* 84 Fed. Reg. at 62280, 62326-27. Issued virtually simultaneously with the 2019 Standard, this proposal suggests that by the time USCIS adopted the 2019 Standard, it *had* completed fiscal analysis and found that such analysis contradicted its earlier suggestion that a stricter fee-waiver standard would avoid fee increases.

Equally unsupported is USCIS's assertion that change was necessary to bring consistency to the fee-waiver standard. USCIS did not explain whether or why it believed the circumstances had changed since it first began accepting benefits-based fee-waiver applications. USCIS also did

[9] Notably, data about the dollar value of fee waivers granted prior to December 2016 is of limited relevance, due to regulatory changes, including changes in the fees USCIS charges (and thus the "value" of any fee waived). *See generally* 81 Fed. Reg. at 73292.

not assess the extent to which the 2019 Standard was needed to achieve (or would achieve) the desired result, and commenters offered reasons that it might not. They explained that means-tested benefits can have income ceilings that are lower than the 150-percent cap that the 2019 Standard otherwise sets. *See, e.g.*, AR3278-79. As a result, it is not clear how much eliminating benefits-based applications would meaningfully change the range of incomes at which individuals can receive fee waivers; indeed, even as adopted, the 2019 Standard permits individuals with income exceeding the 150-percent cap to qualify for fee waivers under the hardship criterion. Further, commenters explained that relying on states' benefits standards leads to an appropriately consistent fee-waiver standard. Receipt of means-tested benefits signifies that a government agency has already concluded that an individual is facing financial constraints, and the state standards can reflect local costs of living. *See* AR2055, 2385, 2567, 2573, 2940, 3220.

USCIS similarly failed to provide a reasoned explanation for other aspects of the 2019 Standard. For starters, USCIS made no attempt to explain why, without the benefits criterion, the income-cap and hardship standard suffice as stand-ins for an individual's inability to pay USCIS fees. USCIS also did not offer a reasoned explanation for its replacement of the flexible framework described in the 2011 Memorandum with evidentiary requirements, or for the specific choices it made about required evidence, even though commenters explained multiple ways that USCIS could allow individuals to establish their income, other than through tax transcripts, *see, e.g.*, AR2475, 2546, 2549, 2573, 2843. The Federal Register notices did not address these issues, and in its responses to comments, USCIS provided only unsupported and incomplete responses. Principally, USCIS focused on the requirement for tax transcripts, and it referenced concerns about unsigned tax returns, "encourag[ing] fraud in the fee waiver process," and reducing fee-waiver denials. AR321 (Apr. Resp. at row 59); *see also* AR247 (Sept. Resp. ¶ 14) (similar); AR402-03

(June Resp. at rows 39, 45) (similar). But USCIS's record includes no evidence to suggest any of these concerns were problems in reality. Alternatively, USCIS asserted that the required income documentation would be the same as that required to receive a means-tested benefit. *See* AR245 (Sept. Resp. at ¶¶ 7, 8); AR320, 328 (Apr. Resp. at rows 47, 103); AR402, 405 (June Resp. at rows 41, 67). But that assertion lacked record support and was contradicted by comments. *See, e.g.*, AR3223-24, 3253, 3270, 3278-79, 3290-91, 3310; AR320 (Apr. Resp. at row 47).

USCIS also did not explain why it eliminated family members' ability to combine related applications into one or why it now requires fee-waiver applicants to explain if any household member did not file taxes the prior year. The Federal Register notices did not mention these changes and USCIS's responses to comments offered only conclusory responses, not "one[s] of *reasoning*." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (internal citation omitted, emphasis in original). *See* AR327 (Apr. Resp. at rows 105-07) (regarding tax questions, offering only that they were added "in response to public comments" and "are appropriate"); *see also* AR247 (Sept. Resp. ¶ 15), AR317 (Apr. Resp. at row 31) (asserting, in conclusory terms, that eliminating combined applications will reduce rejections).

B. USCIS ignored important factors, while crediting inappropriate ones.

The 2019 Standard is also arbitrary and capricious because USCIS "entirely failed to consider" a vital "aspect of the problem," *State Farm*, 463 U.S. at 43: whether immigrants are able to pay USCIS fees. While purporting to interpret the phrase "unable to pay," 8 C.F.R. § 103.7(c)(1)(i), *see* AR242 (Sept. Resp. ¶ 3), USCIS never discussed individuals' financial circumstances, analyzed how they relate to the fee-waiver criteria, or otherwise examined the meaning of the regulatory phrase. *See supra* pp. 24-25. Further, USCIS looked to factors, such as the volume of fees waived, *see* 84 Fed. Reg. at 26139, that are not relevant to an interpretation of

the phrase "unable to pay." *See North Carolina v. EPA*, 531 F.3d 896, 930 (D.C. Cir.) (per curiam) (holding EPA caps on certain pollutants to be arbitrary and capricious because EPA "based them on irrelevant factors"), *reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam).

In addition, USCIS failed to consider and address the ways in which the 2019 Standard harms individuals seeking immigration benefits. Instead of "reflect[ing] upon" and "grappling with" commenters' explanations of this harm, *Fred Meyer*, 865 F.3d at 638, USCIS dodged this "important aspect of the problem," *State Farm*, 463 U.S. at 43, by responding to concerns with conclusory or dismissive statements, if at all. In some instances, USCIS stated simply that it would change the standard "[r]egardless of [the] impact." AR315 (Apr. Resp. at row 13); *see also* AR246 (Sept. Resp. ¶ 10) (similar); AR320-321 (Apr. Resp. at rows 52-53) (responding to burden concerns by stating only that USCIS is aware of burden). In other cases, USCIS used different—but equally incomplete—responses to sidestep commenters' concerns. It repeatedly declared that it "does not believe" or "disagrees" with commenters' statements, but it offered no analysis to support its disbelief. *See* AR314, 317 (Apr. Resp. at rows 7, 27, 33). The agency shrugged off comments about the challenges of obtaining IRS documents by ignoring the comments, asserting—without analysis—that individuals can "easily" obtain such documents, or by avoiding the topic—with blithe responses stating that applicants will have to plan around documentation requirements. AR247 (Sept. Resp. ¶ 14); AR320, 321, 328 (Apr. Resp. at rows 45, 59, 115-117). Similarly, it dismissed concerns that the Standard would deter immigrants from applying for

benefits by asserting that individuals could save up and apply later, without recognizing the harm delay can cause, *see supra* pp. 4-6. AR246 (Sept. Resp. ¶ 9).[10]

These responses do not satisfy the APA requirement for "consideration of the relevant factors." *State Farm*, 463 U.S. at 42. USCIS must provide reasoned and supported analysis, not simply conclusory statements about its beliefs. *Cf. Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 93-94 (D.C. Cir. 2010) (finding agency action arbitrary and capricious, when agency stated only that the action was based on its "knowledge and expertise"; that statement was unsupported by the record; and the agency addressed criticisms "at best" "in a conclusory manner").

Furthermore, many of USCIS's responses to commenters' concerns about harm are "internally inconsistent," *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018), inaccurate, or "ignore[] facts in the record," *Fred Meyer*, 865 F.3d at 638. For example, although the agency dismissed concerns that the 2019 Standard "severely limits fee-waiver eligibility," AR314 (Apr. Resp. at row 8), it elsewhere asserted that "curtailing the rising costs of fee waivers" was its goal, 84 Fed. Reg. at 26139, and estimated that the new Standard would cause fee-waiver applications to drop by nearly 50 percent, *see* AR458, 461. Further, though USCIS asserted that the new Standard would decrease its own workload, AR244-45 (Sept. Resp. ¶¶ 5, 6); AR321, 322, 324 (Apr. Resp. at rows 59, 61, 74), and that "the IRS can handle" the additional document requests

[10] Also, without supporting data, USCIS asserted its "belie[f]" that the Standard's burdens are not "excessive," AR242 (Sept. Resp. ¶ 1), or are "overridden by practical considerations of expenses, costs, and revenue," AR319 (Apr. Resp. at row 43); *see also* AR314, 316, 317 (Apr. Resp. at rows 5, 6, 25, 31) (similar). In other cases, USCIS avoided commenters' concerns by emphasizing the fact that fee waivers or immigration benefits are still available. *See* AR314-317, 321, 328-29 (Apr. Resp. at rows 11, 13, 25, 29, 30, 55, 122, 125).

generated by 2019 Standard, AR321 (Apr. Resp. at row 59), it did so without supporting data, and elsewhere recognized that the 2019 Standard "may increase the complexity of the review," AR320 (Apr. Resp. at row 51). And to dismiss concerns that the 2019 Standard would cause individuals to delay or forgo naturalization applications, USCIS implied that the INA ties USCIS's hands by "requir[ing] USCIS to obtain its funding through fees," AR399 (June Resp. at row 26); *see also* AR316 (Apr. Resp. at row 24), AR399 (June Resp. at row 23) (similar), when the agency stated elsewhere that the statute only *permits* USCIS to charge fees high enough to recover its costs, *see* 84 Fed. Reg. at 62298. Finally, USCIS downplayed concerns about the burden on individuals holding or seeking VAWA or T- and U-visa benefits, by portraying the 2019 Standard as less onerous than it is. USCIS stated that the Standard allows such individuals to provide alternative documentation for either of two reasons: "if they are unable to provide the required evidence … due to their victimization" *or* "if requesting [otherwise required] evidence would trigger further abuse or endanger the individual." AR328 (Apr. Resp. at row 118); *see also* AR405 (June Resp. at rows 66, 69) (similar). The 2019 Standard, however, provides only the first allowance, not the second, to the extent USCIS suggests that would provide additional flexibility. *See* Smullin Dec., Ex. B at 8, 9. Further, USCIS did not address commenters' concerns that individuals seeking such benefits could face challenges and burdens in seeking documents for reasons *other than* their victimization. *See, e.g.*, AR3341-43, 3347-48, 5257 (comments). It responded either repeating that the form allows alternative evidence for individuals who satisfy the "victimization" standard; referencing the "further abuse" standard, that is not reflected in form; or stating that applicants need to plan around documentation needs. *See* AR327, 328 (Apr. Resp. at rows 110, 116, 120).

USCIS also failed to consider the changing regulatory environment for fee waivers, another "important aspect of the problem," *State Farm*, 463 U.S. at 43. As an initial matter, USCIS's

November 2019 proposed rule, if adopted, would not only significantly raise USCIS fees, but also accomplish USCIS's goal of reducing fee waivers, by significantly narrowing eligibility criteria, without any need for the 2019 Standard. *See* 84 Fed. Reg. at 62280, 62326, 62298-301, 62363, 62333. The November proposal thus begs the question of why USCIS's October fee-waiver actions were necessary; USCIS offered no explanation.

USCIS also ignored the relationship between its October actions and other rulemakings that could reduce the number of immigrants receiving means-tested benefits, and thus advance USCIS's goal, of reducing benefits-based applications. For example, USCIS did not discuss its own August 2019 rule that changed the agency's method for determining whether an individual is likely to become a "public charge," a factor relevant in various immigration determinations. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41292 (Aug. 14, 2019).[11] That rule counts an individual's application for or receipt of certain public benefits (or a fee waiver) against the individual. *See id.* at 41503 (reflecting new 8 C.F.R. § 212.22(b)(4)(ii)(E), (F)). USCIS estimated that the rule will deter hundreds of thousands of individuals from accepting public benefits for which they are eligible. As a result, it could limit the number of benefits-based fee-waiver applications that USCIS would receive, even without the 2019 Standard. *See* 84 Fed. Reg. at 41310-14; DHS, *Economic Analysis Supplemental Information for Analysis of Public Benefits Program*, at table 4 (2019), https://www.regulations.gov/document?D=USCIS-2010-0012-63742.

[11] The rule was set to take effect on October 15, 2019. It has been preliminarily enjoined by several district courts, and appeals are pending. *See Casa de Maryland, Inc. v. Trump*, No. PWG-19-2715, __ F. Supp. 3d __, 2019 WL 5190689, at *1 & n.2 (D. Md. Oct. 14, 2019) (with cases cited therein) (appeal pending); *Cook Cty., Ill. v. McAleenan*, No. 19 C 6334, 2019 WL 5110267, at *1 (N.D. Ill. Oct. 14, 2019) (appeal pending).

While ignoring relevant factors, USCIS relied on a "factor[] which Congress has not intended it to consider," *State Farm*, 463 U.S. at 43: "the strong desire of commenters for [USCIS] to retain the means tested benefit policy," which USCIS characterized as evidence that "means tested benefits are too easy to obtain for them to be good indicators of true inability to pay a USCIS fee," AR323 (Apr. Resp. at row 71). This reasoning is not only illogical, but also in conflict with Congress's instruction that agencies should seek and use public input. *See* 5 U.S.C. § 553(c) (APA); 44 U.S.C. §§ 3506(c)(2)(A), 3507(b) (PRA). If agencies could assess the strength of commenters' views against them, that possibility would chill criticisms of agency action and undercut the purpose of public comment: to serve as "a primary method of assuring that an agency's decisions will be informed and responsive." *State of N.J., Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (regarding APA rulemaking).

C. USCIS failed to consider significant, viable, and obvious alternatives.

The 2019 Standard also contravenes the APA, 5 U.S.C. § 706(2)(A), because USCIS "fail[ed] to consider significant and viable and obvious alternatives," *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015) (citation and quotation marks omitted). For example, USCIS stated it was concerned about individuals supporting their applications with unsigned copies of tax returns or proof of benefits that are not means tested, *see* AR247 (Sept. Resp. ¶ 14); AR321, 323 (Apr. Resp. at rows 59, 73). But USCIS did not consider plainly available options to address any such problem: expressly requiring that if individuals submit copies of tax returns, that they submit copies of the signed and submitted return; otherwise clarifying the prior version of the I-912 form's instructions; using requests-for-evidence to address deficiencies in specific applications instead of increasing the requirements for everyone; or allowing individuals to submit income documentation other than tax transcripts, including documentation from employers or

documentation from other government agencies. Indeed, a government agency's notice that an individual receives benefits from such agency can be evidence of income, when the benefits standard is consistent with USCIS's income standard. Such a government-provided form should be as reliable as the documentation from religious organizations and nonprofits that USCIS deems sufficient in some cases, Smullin Dec., Ex. B at 6, 8. *See* AR2957. But USCIS rejected this alternative with only the unsupported suggestion that such an alternative "would be more difficult than" the 2019 Standard. AR324 (Apr. Resp. at row 78).

USCIS also failed to consider other approaches that could have reduced any variability, among states, in the income levels at which individuals could receive fee waivers. The agency could have retained benefits-based eligibility for benefits programs whose requirements are consistent with the 150-percent income-standard. Alternatively, USCIS could have *raised* the income ceiling, to match or exceed any higher ceilings used by benefits-granting agencies.[12]

III. The Policy Manual revision and USCIS's decision to stop applying the 2011 Memorandum are also arbitrary and capricious.

USCIS also acted arbitrarily and capriciously when it decided to stop applying the 2011 Memorandum and revised the Policy Manual to add new chapters to volume 1, part B. These agency actions are products of the same reasoning flaws described in section II above. USCIS made no attempts to justify them, other than its attempts to explain the 2019 Standard. Moreover,

[12] Indeed, when the agency set out the 150-percent income criterion in its first I-912 form, it adopted that income level after commenters "noted that this is a standard measure for determining if an individual qualified for a mean[s]-tested benefit." *See* USCIS, *Supporting Statement, Request a Fee Waiver (Form I-912), OMB No. 1615-New* (2010), https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201007-1615-007 (at "Supporting Statement A").

USCIS did not make any attempt to explain the aspects of the Policy Manual revision that go beyond the requirements of the 2019 Standard.

For example, USCIS did not explain its prohibition on USCIS officers issuing RFEs for fee waiver requests. *See* AR508. A commenter explained that the opposite approach—allowing applicants to supplement deficient requests and thus avoid denial—could "ease th[e] burden" of fee-waiver denials, AR4301. But USCIS did not address this comment or justify its policy choice.

Similarly, USCIS did not explain the Policy Manual revision's discussion of 8 U.S.C. § 1255(*l*)(7), the statute that requires DHS to "permit aliens to apply for a waiver of any fees associated with filing an application for relief through final adjudication of the adjustment of status for a VAWA self-petitioner and for relief under sections 1101(a)(15)(T), 1101(a)(15)(U) [regarding T and U visas]" and certain other statutory provisions. The new Policy Manual material states that the agency interprets the provision "to mean that, in addition to the primary benefit request, an applicant who files any form that may be filed with the primary benefit request or the adjustment of status application must be provided the opportunity to request a fee waiver." AR499. But that interpretation is different than the 2011 Memorandum's discussion of humanitarian fee waivers, which stated that "USCIS may waive <u>any</u> fees associated with the filing of any benefit request by a VAWA self-petitioner or under" enumerated statutory provisions, AR46. Plaintiff is concerned that by referencing only forms associated with a "primary benefit request" and "the adjustment of status application," USCIS is seeking to narrow the interpretation of § 1255(*l*)(7), without explaining the extent to which it seeks to do so; offering a reason for any change; or explaining the relationship between this interpretation and the fee-waiver regulation, which lists waivable fees, 8 C.F.R. § 103.7(c)(3). *See* AR499; *compare id.* with AR46 (2011 Memorandum).

IV. USCIS did not comply with the Paperwork Reduction Act.

The PRA and its implementing regulations set out requirements that an agency must satisfy before adopting or modifying collections of information. *See generally* 44 U.S.C. §§ 3506-3507; 5 C.F.R. § 1320.5. In issuing the new I-912 form and its instructions, USCIS violated those requirements. As USCIS has recognized, the 2019 Standard reflects a modification to USCIS's fee-waiver information-collection. But USCIS adopted the 2019 Standard on the basis of PRA submissions that were not supported by the record or that otherwise contravened the PRA's requirements. For this reason, the Court should set aside the October 2019 revisions to the fee-waiver information-collection.[13]

First, USCIS violated the PRA's requirement that USCIS produce "[a] specific, objectively supported estimate of the burden" imposed by the 2019 Standard. 5 C.F.R. § 1320.8(a)(4); *see also id.* § 1320.5(a)(1)(i) (requiring compliance with § 1320.8(a)). USCIS relied on a burden estimate that was unsupported and contradicted by the record. The "Supporting Statement" that USCIS submitted to OMB stated that completion of the October 2019 I-912 form would take 2.33 hours, on average, *see* AR456, 458, and it neither supported this estimate with analysis nor reconciled it with comments suggesting that completing the form would take much longer, *see*, *e.g.*, AR2741, 2961, 4354, 5063. Further, USCIS contradicted the record by estimating that there are no start-up or operational costs associated with the new I-912 form other than the cost of mailing an application to USCIS. *See* AR456-57. Elsewhere, USCIS acknowledged that the new I-912 form

[13] USCIS's PRA failures could be considered to contravene either 5 U.S.C. § 706(2)(A) or (D). Under either provision, the result is the same: The Court should declare the modifications to USCIS's fee-waiver information-collection unlawful and set them aside.

would require individuals to bear the costs of translating IRS or other forms, *see* AR403 (June Resp. at row 50), and communicating with the IRS, *see* AR402 (June Resp. at row 40). Responding to the I-912 form could require collecting documents from other sources, as well, and service providers explained that the new Standard would require them to overhaul their service delivery models. *See supra* pp. 16. But USCIS did not reflect these burdens in its estimate. *See generally* 5 C.F.R. § 1320.3(b)(1) (defining "burden" broadly).

Second, USCIS violated the PRA by certifying, without support, that the 2019 Standard met certain standards in 5 C.F.R. § 1320.9. *See* OMB, *View ICR-OIRA Conclusion*, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201910-1615-006 (last visited Dec. 2, 2019) (with "all" selected). The PRA required USCIS to "provide a record supporting such certification," 5 C.F.R. § 1320.9(a); *see also id.* § 1320.5(a)(1)(iii)(A) (requiring certification). Here, the record fails to support—and often contradicts—the certification. For instance, USCIS certified that the requested information "[i]s necessary for the proper performance of the functions of the agency, including that the information to be collected will have practical utility," *id.* § 1320.9(a). But as explained above, USCIS did not justify why it needs tax transcripts, rather than tax returns or other income documentation; it also did not justify why it needs an explanation for an applicant's or a household member's lack of tax filing. *See supra* pp. 31-32. USCIS also did not support its certification that the revised collection "[r]educes to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency," *id.* § 1320.9(c). Commenters explained that USCIS's new I-912 form and instructions would increase, rather than reduce, the burden on fee-waiver requesters and the service-providers that aid such

requesters. *See supra* pp. 14-17. USCIS ignored or dismissed concerns with conclusory statements and failed to consider less burdensome alternatives. *See supra* at 33-35, 37-38.[14]

Relatedly, USCIS did not support its certification that the revised information-collection "[i]s to be implemented in ways consistent and compatible, to the maximum extent practicable, with the existing reporting and recordkeeping practices of those who are to respond," 5 C.F.R. § 1320.9(e). USCIS ignored commenters' explanations of why the newly required documentation goes beyond documentation that individuals keep on hand or have to provide in other contexts, and it rejected suggestions that the agency accept a greater range of documentation, to include evidence that would more closely match individuals' existing reporting and recordkeeping practices. *See, e.g.*, AR2092-93, 3223-34, 3253, 3270, 3278-79, 3290-91, 3310 (explaining that revised I-912 form requires different documents than means-tested benefits applications); *see also* AR315, 320 (Apr. Resp. at rows 12, 47) (replying to concerns that the I-912 form requires *different* documentation than benefits applications with statements that ignore the issue or re-assert, without support, that requirements in the two contexts are the same); AR3349-50, 4300 (urging agency to adopt existing legal standard, permitting "any credible evidence" for survivors seeking humanitarian benefits); *see generally* AR2475, 2546, 2549, 2843 (suggesting USCIS accept other types of documentation).

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[14] For these reasons, USCIS also flouted the PRA's requirement that it "demonstrate that it has taken every reasonable step to ensure that the proposed collection of information" meets certain standards, including that it "[i]s the least burdensome necessary for the proper performance of the agency's functions" and "[h]as practical utility," 5 C.F.R. § 1320.5(d)(1). The extensive record on the challenges that individuals will face in completing the October 2019 I-912 form, *see supra* pp. 14-17, shows that even if USCIS was "seek[ing] to minimize the cost to itself of collecting, processing, and using the information," it did so by "shifting disproportionate costs or burdens onto the public"—a trade-off that the PRA instructs that agencies "shall not" make, 5 C.F.R. § 1320.5(d)(1)(iii).

CONCLUSION

For the foregoing reasons, this Court should grant NWIRP's motion for summary judgment, and hold unlawful and set aside (1) USCIS's October 24, 2019 revisions to the I-912 form and its instructions, (2) USCIS's decision to stop applying the 2011 Memorandum, and (3) USCIS's revision to its Policy Manual, adding new volume 1, part B, chapters 3 and 4, regarding fees and fee waivers, to supersede sections 10.9 and 10.10 of the USCIS Adjudicator's Field Manual and related material.

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