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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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March 13, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES

REGULATIONS AND FEDERAL REGISTER NOTICES

OTHER AUTHORITIES

INTRODUCTION

Immigrants apply to U.S. Citizenship and Immigration Services (USCIS) for benefits that allow them to live, work, and become citizens in the United States. The cost of filing fees alone can be prohibitive: USCIS charges, for example, more than $700 to seek naturalization and more than $1,000 to apply for lawful permanent residence. For this reason, USCIS has long excused filing fees for individuals with limited financial means. Its regulation allows waivers of certain fees for individuals "unable to pay." 8 C.F.R. § 103.7(c)(1)(i). *See* Dkt. 11 at 9-14.

In October 2019, however, the agency restricted fee-waiver eligibility. It retired its 2011 Memorandum setting out a flexible framework for fee-waiver applications, adopted a new fee-waiver form and instructions stating a new standard (2019 Standard) with a narrower set of eligibility criteria and other demanding new requirements, and changed its Policy Manual to require USCIS officers to implement the new standard and make other practice changes. Under the agency's prior practice, immigrants were eligible for fee waivers if they received means-tested benefits, had a household income at or below 150 percent of the federal poverty guidelines, or showed "hardship." The October fee-waiver actions, however, eliminate benefits-based applications and restrict fee waivers to immigrants who satisfy the income or hardship criterion using prescribed documents to establish their eligibility. In many cases, the 2019 Standard requires that immigrants obtain Internal Revenue Service (IRS) tax transcripts or similar documents for themselves and their household members. Among other things, the actions also require immigrants to explain their own and their household members' tax filing history, submit requests on USCIS's I-912 form, and apply individually (instead of combining family members' related applications). *See* Dkt. 11 at 15-19.

As explained in the memorandum of plaintiff Northwest Immigrant Rights Project (NWIRP) in support of its motion for summary judgment, Dkt. 11, USCIS's fee-waiver actions are unlawful and should be set aside under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2), for several reasons. First, USCIS adopted the 2019 Standard without the notice-and-comment rulemaking required by the APA, 5 U.S.C. § 553. Second, the fee-waiver actions are arbitrary and capricious. The agency provided no reasoned basis for the 2019 Standard, its abandonment of the 2011 Memorandum, or the Policy Manual revision. Finally, USCIS ignored requirements of the Paperwork Reduction Act (PRA), which establishes prerequisites for agencies seeking to revise collections of information, such as the fee-waiver form and its instructions.

USCIS's combined response and motion misapplies legal standards and misrepresents its own actions. This Court should grant summary judgment to NWIRP, declare USCIS's actions unlawful, and set them aside.[1]

[1] A recent opinion by this Court raises a serious question whether USCIS's actions should also be set aside because of the impropriety of the acting director's appointment. USCIS took the actions at issue in October 2019, in accordance with a policy alert from the USCIS Office of the Director. *See* AR484; *see also* Dkt. 11-2 at 4-24 (stating date of adoption). The then-acting director was Kenneth Cuccinelli, whom this Court has concluded held the position in violation of the Federal Vacancies Reform Act (FVRA). That FVRA violation rendered action taken under 6 U.S.C. § 271, regarding the director's functions, without legal force and arbitrary and capricious. *See L.M.-M. v. Cuccinelli*, __ F. Supp. 3d __, No. CV 19-2676 (RDM), 2020 WL 985376, at *1-2, 19-24 (D.D.C. Mar. 1, 2020); *see also* Notice of Correction, *City of Seattle v. DHS*, No. 3:19-cv-07151-MMC (N.D. Cal. Nov. 25, 2019), ECF No. 51 (showing Cuccinelli held the position from the June appointment date referenced in *L.M-M* at least through November 25, 2019).

ARGUMENT

I. NWIRP has standing.

NWIRP is a nonprofit that "seeks to promote justice by defending and advancing the rights of immigrants through direct legal services, systemic advocacy, and community education." Dkt. 11-1 at 1 (Barón Dec. ¶ 2). When USCIS's fee-waiver actions take effect, they will make it more difficult for NWIRP to pursue its daily work of directly representing clients "seeking a range of immigration benefits," *id.* (¶ 3), including naturalization, asylum, and protections for victims of abuse, trafficking, or crimes (such as T visas, U visas, and benefits under the Violence Against Women Act (VAWA)), *id.* at 2 (¶¶ 6-8). NWIRP will devote time and financial resources to addressing this harm. Thus, NWIRP has standing: It will suffer "actual or threatened injury in fact that is fairly traceable to [USCIS's] illegal action[s] and likely to be redressed by a favorable court decision." *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (*PETA*) (citation omitted).

USCIS's argument that NWIRP lacks standing is meritless. In a procedural challenge to an agency action, a plaintiff satisfies the injury-in-fact requirement by demonstrating that the action itself causes actionable injury. *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014). It is well established that for an organizational plaintiff, "'a concrete and demonstrable injury to [that] organization's activities—with the consequent drain on the organization's resources—'… suffices for standing." *PETA*, 797 F.3d at 1093 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). With undisputed evidence, NWIRP has established such injury by showing that USCIS's actions will "injure[]" its "interests" and that NWIRP will "use[] its resources to counteract that harm." *Id.* at 1094 (citation omitted).

A. USCIS's actions inhibit NWIRP's work, and NWIRP will spend resources to counteract the harm.

USCIS's fee-waiver actions make the "overall task" of NWIRP's direct representation "more difficult." *Equal Rights Ctr. v. Post Props.*, 633 F.3d 1136, 1139 (D.C. Cir. 2011) (citation omitted). The actions increase the effort and time needed by NWIRP to help clients with their fee-waiver requests and insert greater uncertainty into the process. *See* Dkt. 11-1 at 1-3, 6-8, 11 (Barón Dec. ¶¶ 2-3, 6-8, 10, 16, 27-36, 41-42). "NWIRP will not be able to serve as many clients as it could previously," *id.* at 10 (¶ 40), as it will have to "spend extra time helping clients compile and submit their fee-waiver applications," *id.* at 9 (¶ 39). For instance, because of the 2019 Standard's new demands, NWIRP will spend more time helping clients "understand and evaluate fee-waiver options; identify, collect, review, and prepare required documentation and information; and re-submit applications." *Id.* Among other things, NWIRP will need to help clients prepare multiple applications for family members, rather than one combined. *See id.* at 9 (¶ 39(a)); *see also id.* at 9-10 (¶ 39) (providing more detail about use of time). This injury is "concrete and specific to the work in which" NWIRP is engaged; it "hamper[s] and directly conflicts" with NWIRP's mission, *PETA*, 797 F.3d at 1095, of "defending and advancing the rights of immigrants through direct legal services," Dkt. 11-1 at 1 (Barón Dec. ¶ 2). *See generally* Dkt. 9 at 20-21 (First Am. Compl. ¶¶ 85-91).

In addition to spending more time on fee-waiver cases and taking time away from other clients, *see* Dkt. 11-1 at 9-10 (Barón Dec. ¶¶ 39-40), NWIRP will expend resources to counteract this injury in other ways. For example, NWIRP will spend more time training its own staff and others on the new fee-waiver standard and related issues, such as the requirements for seeking documents from the IRS. *See id.* at 11-12 (¶¶ 44-45). NWIRP will also divert money to aid clients

with their filing fees. When USCIS denies a fee waiver request, it returns the application for benefits (*e.g.*, naturalization) and the filing date is lost; a new submission may be untimely. *See* Dkt. 11 at 14, 24-25; Dkt. 11-1 at 5 (Barón Dec. ¶ 23); *see also* 84 Fed. Reg. 26137, 26140 (June 5, 2019) (stating USCIS practice). By lengthening the time required to prepare a fee-waiver request and making the results of fee-waiver applications more uncertain, USCIS's actions increase the risk that, due to this type of application return, NWIRP will be unable to successfully submit clients' benefit applications on their merits. *See* Dkt. 11-1 at 5, 8, 11 (Barón Dec. ¶¶ 23, 33-35, 42); Dkt. 11 at 24-25 (record evidence); *see generally* Dkt. 9 at 21-23 (First Am. Compl. ¶¶ 91-94) (similar). Indeed, in some cases, filing deadlines may be shorter than the time that IRS takes to provide a tax document that the 2019 Standard requires to support a fee-waiver request. *See* Dkt. 11 at 23, 24 (discussing timing considerations); AR2841-42 (noting 30-day deadline); AR3348-49 (similar); Dkt. 11-2 at 19, 24 (requiring IRS documentation even to establish a lack of income). NWIRP has therefore set aside extra money in its budget to allow it to advance application fees for clients facing urgent immigration deadlines, unable to proceed if they must pay USCIS fees, and for whom the October 2019 fee-waiver actions increase the chance that a fee-waiver application will be denied and cause a benefit filing deadline to be missed. *See* Dkt. 11-1 at 11 (Barón Dec. ¶¶ 41-43); *see generally* Dkt. 9 at 22-23 (First Am. Compl. ¶¶ 91-94).

USCIS suggests that NWIRP's injury cannot support standing because it is too abstract or because USCIS's actions harm only NWIRP's clients. *See* Dkt. 25-1 at 23-24. But those arguments ignore that USCIS's actions "inhibit[]" NWIRP's "daily operations" of helping clients apply for immigration benefits, *PETA*, 797 F.3d at 1094 (citation omitted), and that such "perceptibl[e] impair[ment]" is concrete harm to the *organization*, *id.* at 1095 (citation omitted). Indeed, this Court has concluded that another immigration legal-services organization had standing to

challenge agency action in directly comparable circumstances: when the agency action would require the organization to spend resources on creating new procedures, preparing clients for interviews and testimony, appealing more negative determinations, assisting clients with multiple applications for relief instead of one application for multiple family members, creating implementation resources, and training and retraining staff, and as a result, the organization would "spend more resources on each individual case," "be unable to represent the same number of clients that it currently does," and divert resources from other programs. *O.A. v. Trump*, 404 F. Supp. 3d 109, 143 (D.D.C. 2019) (appeal pending). Similarly, this Court concluded that another plaintiff in the case had standing because the action would reduce some of its funding and "dramatically reduce the number of clients [the plaintiff] can serve or … require it raise more funds to serve the same number of clients," since the organization would have to help clients "meet a substantially more demanding test" that requires more interview preparation time and "tax [its] resources" in other ways. *Id.* at 142-43 (quotation marks, citation omitted).

NWIRP's injury is also analogous to the harm in *League of Women Voters of the United States v. Newby*, 838 F.3d 1 (D.C. Cir. 2016), in which the D.C. Circuit concluded that a voting-rights organization had standing to challenge an action that increased voter-registration documentation requirements. There, as here, the challenged action made it more difficult to help individuals (*i.e.*, to register voters) and caused the number of voters "successfully registered" by the organization to "plummet[]." *Id.* at 7. The D.C. Circuit has also recognized similar types of cognizable injuries "in a wide range of circumstances." *O.A.*, 404 F. Supp. 3d at 142 (quoting *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 468 F.3d 129, 133 (D.C. Cir. 2006)). *See, e.g.*, *PETA*, 797 F.3d at 1095-96 (organization has standing when challenged policy denies information and "a means by which to seek redress," making it harder to bring

violations "to the attention of" an agency and "educate the public," and the organization was spending extra resources investigating and responding to complaints, among other things); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 28 (D.C. Cir. 1990) (organization has standing when challenged advertising, among other things, "decreases the effectiveness of [plaintiff organization's] efforts to educate the real estate industry and the community about laws prohibiting discrimination," requiring "increased educational efforts" (internal quotation marks and citation omitted)); *Action All. of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) (organization has standing when challenged action inhibits its routine activities to help elderly individuals, meaning, among other things, that the organization is denied "avenues of redress" and left with only a more "time-consuming and expensive" option for contesting service denials); *see also OCA–Greater Houston v. Texas*, 867 F.3d 604, 610-12 (5th Cir. 2017) (voting-rights organization has standing to challenge law that means it "must spend more time on each call (and reach fewer people in the same amount of time)").

NWIRP also satisfies the requirements for traceability and redressability. In a procedural challenge, "the normal standards for immediacy and redressability are relaxed. ... [I]f the plaintiffs can demonstrate a causal relationship between the final agency action and the alleged injuries, the court will assume the causal relationship between the procedural defect and the final agency action." *Mendoza*, 754 F.3d at 1010 (cleaned up, citations omitted). As described above and in the Barón declaration, USCIS's actions will impede NWIRP's ability to represent clients. Without those actions, NWIRP can continue its current practice. *See* Dkt. 11-1 at 5 (Barón Dec. ¶ 26).

B. The injury to NWIRP is not speculative or self-inflicted.

USCIS does not dispute NWIRP's evidence, and its responses to NWIRP's showings fall flat. For instance, USCIS attempts to minimize NWIRP's harm by noting that NWIRP sometimes

uses earlier versions of the I-912 form and submits some fee-waiver applications based on clients' income or hardship. *See* Dkt. 25-1 at 24; Dkt. 11-1 at 3-4 (Barón Dec. ¶¶ 14-22). But that argument ignores the agency's own estimate that fee-waiver applications using the October 2019 form and the 2019 Standard will take double the amount of time to prepare. *See* AR458. It also ignores NWIRP's showing of *why* USCIS's actions will make the fee-waiver process more uncertain and require the organization to spend more time with fee-waiver clients: Under the 2019 Standard, applicants *must* submit income- and hardship-based applications, in place of benefits-based applications. Already, income- and hardship-based applications take NWIRP longer to prepare than benefits-based ones and more frequently require NWIRP to re-submit applications after initial denials. *See* Dkt. 11-1 at 4 (Barón Dec. ¶¶ 16, 21). Now, the 2019 Standard and other fee-waiver actions will make preparing income- and hardship-based applications even *more* time-consuming for NWIRP in serving its clients and involve a *greater* risk of denial. *See id.* at 6-8, 9-10 (¶¶ 29-35, 39); *see generally* Dkt. 9 at 20-22 (First Am. Compl. ¶¶ 85-92).

Similarly incomplete is USCIS's mention of clients establishing eligibility based on a single tax transcript, obtaining tax transcripts themselves, or applying under the hardship standard. *See* Dkt. 25-1 at 25-26. These scenarios fail to acknowledge the full scope of the 2019 Standard's demands, as well as the circumstances of NWIRP's clients. The 2019 Standard does not simply require a single tax transcript. Instead, it requires a case-specific evaluation of which documents are needed. And, in most circumstances, it demands that an immigrant obtain *multiple* tax transcripts or other documents from the IRS—to cover the applicant's household members, not simply the applicant. Further, the income criterion requires the collection and review of supplemental or alternative income documentation (including affidavits from outside entities) in many instances. And the hardship criterion requires a full accounting of an applicant's financial

circumstances—not simply proof of income. *See* Dkt. 11-2 at 19-23. In every case, the 2019 Standard requires immigrants to complete a mandatory form that requests other new information, including an evaluation of why any applicant—or any household members of that applicant—did not file taxes in the prior year. *See id.* at 6. And for family members submitting related applications, the form will need to be completed multiple times, rather than simply once. *Compare* AR170 *with* Dkt. 11-2 at 16; *see generally* Dkt. 9 at 13-14 (First Am. Compl. ¶¶ 64-66).

These demands hamper NWIRP's work in multiple ways, especially because of the client base that NWIRP serves. The organization represents only low-income immigrants, and it prioritizes serving individuals with disabilities, with limited English skills, escaping abuse, or in other vulnerable or complex circumstances. *See* Dkt. 11-1 at 2, 7 (Barón Dec. ¶¶ 5-7, 30(c)). Many of these individuals cannot seek tax transcripts for themselves through the IRS options that USCIS highlights. *See id.* at 7 (¶ 30(c)). Even seeking an IRS form by mail, through the IRS website that USCIS mentions, requires internet access, literacy in English or Spanish, and the address on file with the IRS, which a significant number of NWIRP clients do not have. *See* Dkt. 11-1 at 7 (Barón Dec. ¶ 30(c), (d)); *see generally* IRS, *Welcome to Get Transcript*, https://www.irs.gov/individuals/get-transcript (Dec. 30, 2019); IRS, *Get Transcript FAQs* (Dec. 30, 2019), https://www.irs.gov/individuals/get-transcript-faqs. Household members may face similar challenges in seeking their own tax transcripts to support the applicant's request. *See* Dkt. 11-1 at 9 (Barón Dec. ¶ 39(c)).

NWIRP clients will also need NWIRP's assistance in a variety of areas other than seeking tax transcripts. Simply communicating the new requirements to clients, preparing their forms (in some cases multiple ones, rather than one), and helping clients analyze and address new questions about tax filing will require additional time from NWIRP. NWIRP will also help its clients work with members of their households and outside entities, from whom the 2019 Standard requires

documentation in a variety of instances, *see* Dkt. 11-2 at 20-21; substantiate their lack of income and documentation, when required; understand the implications of the new standard and the time it takes to complete an application; and re-submit denied applications. *See id.* at 9-10 (¶ 39(a)-(g)); *see generally* Dkt. 9 at 2-3, 21-22 (First Am. Compl. ¶¶ 7-10, 89-92).

USCIS implies that NWIRP staff could choose not to spend as much extra time helping fee-waiver clients. *See* Dkt. 25-1 at 24, 27. But it never disputes that, in some regard, helping clients complete and file fee-waiver requests requires more effort under the 2019 Standard than previously. And even if it were possible to ignore clients' needs and still responsibly provide direct representation, that option would not defeat standing; an organization's expenditures in response to harmful conduct establish standing even when the "organization could have chosen … not to respond." *Equal Rights Ctr.*, 633 F.3d at 1140. (Notably, USCIS's reference to one-on-one services as an alternative, *see* Dkt. 25-1 at 26, is inapposite; direct representation is what NWIRP already does.)

Similarly unavailing is USCIS's suggestion that NWIRP is speculating about its clients' needs and the amount of time NWIRP will need to spend helping them, and that thus NWIRP's injury is not cognizable or traceable to USCIS. *See* Dkt. 25-1 at 24, 27. NWIRP has shown cognizable injury by establishing a "'substantial risk' that the anticipated harm will occur." *N.Y. Republican State Comm. v. SEC*, 927 F.3d 499, 504 (D.C. Cir. 2019) (citation omitted) (explaining that "substantial risk" is an alternative to the "clearly impending" standard that USCIS cites). It has also established traceability by showing "the predictable effect of Government action on" its clients' needs for assistance. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). Again, it is undisputed that preparing fee-waiver requests under the new standard will take more time. And because NWIRP *already* serves clients who rely on the organization's assistance to apply for

fee waivers, *see* Dkt. 11-1 at 3 (Barón Dec. ¶¶ 10-12), it is, at the very least, a "substantial risk" and "predictable" that helping individuals within the same client base understand a more complex standard and complete more time-intensive fee-waiver applications will take more of NWIRP's time, especially because the application form demands new analysis regarding tax-filing history, must be accompanied by documentation that can be time-consuming to obtain, must be completed multiple times for family members seeking related benefits, and has a greater chance of requiring re-filing after an initial denial. *Cf. O.A.*, 404 F. Supp. 3d at 142-43 (concluding that legal organizations have standing based on declarations describing the ways in which agency actions will frustrate their direct-representation work). NWIRP's assessment of the effects of USCIS's actions rests on a firm foundation: NWIRP's focus on low-income clients, *see* Dkt. 11-1 at 2 (Barón Dec. ¶ 5), its experience helping clients with fee waiver applications, *see id.* at 3-5 (¶¶ 10-23), its understanding of the client populations it serves, *see id.* at 2, 7 (¶¶ 3-6, 30(a), (c), (d)), and the new demands of USCIS's fee-waiver actions, *see id.* at 6-8, 9-10 (§§ 27-35, 39). NWIRP's assessment is also supported by extensive record material, *see* Dkt. 11 at 16-17, 22-25. Indeed, in other cases, plaintiffs' risks of harm have been deemed cognizable even when based on a thinner foundation or involving inferences about more distant third parties. *See, e.g., N.Y. Republican State*, 927 F.3d at 503-04 (finding standing to challenge rule regulating certain individuals' solicitations for political contributions based on inference that one of an individual's contacts would give money to a political party if the individual asked, without any evidence about the contacts); *In re Idaho Conservation League*, 811 F.3d 502, 509-10 (D.C. Cir. 2016) (finding standing to challenge agency delay in issuing regulation based on assumption that a mine, "still in the planning stage," will be built and release more hazardous substances than if the regulation had been issued).

USCIS similarly errs in describing as speculative NWIRP's expectation that due to the October 2019 fee-waiver actions, NWIRP will spend more time helping clients re-apply for fee waivers that USCIS denies on the first application. *See* Dkt. 25-1 at 27. Here too, NWIRP's expectation is supported by the organization's extensive experience. The Barón declaration explains that, under USCIS's earlier practice, NWIRP would re-submit fee-waiver applications that USCIS first denied, *see id.* at 4-5 (¶¶ 21-22), and that fee-waiver denials—and thus re-submissions—will likely increase under the 2019 Standard, *see id.* at 8, 10 (¶¶ 33-35, 39(g)). The declaration cites NWIRP's prior experience, which shows that the types of fee-waiver applications that will now be permissible are those that USCIS tends to deny *more frequently* than the type *no longer permitted*, *id.* at 4 (¶ 21). *See id.* at 8 (¶ 33). It also explains that the 2019 Standard and Policy Manual revision increase the risk of denial because they introduce additional uncertainty about the agency's requirements and prohibit requests-for-evidence (RFEs), which the agency could use to avoid denials. *See id*. at 8 (¶¶ 33-35); *see generally* Dkt. 9 at 7, 21, 21-22 (First Am. Compl. ¶¶ 32, 89, 91(a), (c)). Commenters expressed similar concerns. *See* Dkt. 11 at 17, 24-25. USCIS's statement that it adopted the 2019 Standard to reduce the number of applications rejected due to the submission of incomplete or unsigned tax forms, *see* Dkt. 25-1 at 27, is irrelevant. It is unsupported by data in the record and, even if credited, would not call into question NWIRP's assessment about increased denials. USCIS does not suggest that *NWIRP* experienced a problem with rejections due to incomplete or unsigned tax forms, which the 2019 Standard will solve. *See* Dkt. 11-1 at 4 (Barón Dec. ¶ 16) (stating that NWIRP would support fee-waiver applications with copies of *submitted* tax forms). Moreover, the tax-transcript requirement does not address the other sources of uncertainty identified by NWIRP.

USCIS's complaint that NWIRP did not quantify the resources it will spend or discuss past efforts, *see* Dkt. 25-1 at 29, is wholly without merit. NWIRP has explained that it already set aside money to be prepared to advance clients' fees and began modifying material. *See* Dkt. 11-1 at 11 (Barón Dec. ¶¶ 43, 44(a)). But NWIRP's standing rests on future injury, not past harm, and does not depend on the degree of such injury. *See N.Y. Republican State*, 927 F.3d at 504.

Similarly unavailing is USCIS's effort to paint NWIRP's expenditures as irrelevant. because they are "consistent with its ordinary program costs," "fall well within NWIRP's bailiwick as an immigration legal services organization," reflect "internal choices over how to allocate resources," or "are proactive choices." Dkt. 25-1 at 28-29. These statements misrepresent the relevant test. An organization making expenditures to "counteract" a harm to its interest has standing, *PETA*, 797 F.3d at 1094, even if it "could have chosen instead not to" make those expenditures, *Equal Rights Ctr.*, 633 F.3d at 1140, and even if those expenditures amount to "increased … efforts" in existing lines of work, *Spann*, 899 F.2d at 28. As explained above and in the Barón declaration, NWIRP's expenditures satisfy this standard because they "result" from USCIS's October 2019 fee-waiver actions. *PETA*, 797 F.3d at 1096. In other words, as USCIS does not meaningfully contest, NWIRP will spend more resources serving fee-waiver clients than it would have otherwise (and not be able to serve as many clients), take extra money out of its budget to advance clients' fees, and take extra time from other activities to develop materials and conduct trainings "in response to, and to counteract, the effects of" USCIS's unlawful actions, which hamper USCIS's work, *id.* at 1097 (citation omitted). *See* Dkt. 11-1 at 9-12 (Barón Dec. ¶¶ 39-45). The cases USCIS cites regard plaintiffs who did not show that their activities were impaired. NWIRP, however, has made that showing. And though USCIS reiterates that NWIRP sometimes uses an earlier version of the I-912 form and submits some applications based on

clients' income or hardship, that fact, again, does not erase the multiple ways in which USCIS's actions will frustrate NWIRP's ability to carry out its mission. *See supra* pp. 7-10.

II. NWIRP's claims are actionable.

A. NWIRP is within the zone of interests of the laws at issue.

NWIRP's interest in helping low-income individuals seek and receive immigration benefits, including by assisting with fee-waiver applications, satisfies the "lenient" zone-of-interests test. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014). Not "especially demanding," *id.* at 130 (citation omitted), this test requires simply that a plaintiff's interest be "*arguably* within the zone of interests to be protected or regulated" by the relevant statute. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (emphasis added, citation omitted). Giving "the benefit of any doubt" to the plaintiff, it "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 225 (internal quotation marks and citation omitted). The relevant statutory provisions include both "the statute in question" and "any provision integrally related to it." *Conference Grp., LLC v. FCC*, 720 F.3d 957, 963 (D.C. Cir. 2013) (cleaned up, citation omitted).

Here, USCIS contends that NWIRP is outside the "zone of interests" of an Immigration and Nationality Act (INA) provision, 8 U.S.C. § 1356(m). *See* Dkt. 25-1 at 31. But, USCIS's fee-waiver actions rest on two provisions. Section 1356(m), cited by USCIS, recognizes the government's authority to provide immigration "adjudication and naturalization services … without charge to asylum applicants or other immigrants." Another provision, 8 U.S.C. § 1255(*l*)(7), requires the Secretary of Homeland Security to permit individuals seeking certain humanitarian benefits to apply for fees waivers. *See generally* 84 Fed. Reg. at 26138 (recognizing

both provisions). Because an evident purpose of both provisions is to "protect[] or regulate[]" the availability of fee waivers, *Match-E-Be-Nash-She-Wish*, 567 U.S. at 224, NWIRP's interest in helping clients seek immigration benefits with fee waivers is neither "marginally related to [nor] inconsistent with the purposes" of those provisions, *id.* at 225 (citation omitted).

NWIRP's interest in serving clients seeking immigration benefits is also related to and consistent with the broader purpose of the INA, to establish a "comprehensive federal statutory scheme for regulation of immigration and naturalization" that "set[s] the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 587 (2011) (internal quotation marks and citation omitted). The fee-waiver provisions are part of, and integrally related to, this "scheme." The INA establishes immigration benefits requirements, and thus creates USCIS "services" to be provided "without charge" under section 1356(m) and "application[s] for relief" for which fee-waiver applications must be permitted under section 1255(*l*)(7). *See O.A.*, 404 F. Supp. 3d at 144 (holding that "organizational plaintiffs' interest in representing asylum seekers furthers the purposes of the INA"); *see also E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 768 (9th Cir. 2018) (similar).[2]

USCIS acknowledges that NWIRP's *clients* would fall within the zone of interests here, but protests that NWIRP does not because NWIRP's standing theory is based on the harm to NWIRP. *See* Dkt. 25-1 at 31. APA plaintiffs, however, may satisfy the zone-of-interests test even when they are not the statutes' beneficiaries and there is "no indication of congressional purpose

[2] *See, e.g.*, 8 U.S.C. §§ 1101(a)(15)(T), (U), 1101(a)(51), 1101(i), 1184(o), (p), 1255(*l*), (m) (relating to T visas, U visas, and VAWA benefits); *id.* § 1158 (asylum); *id.* § 1421 *et seq.* (naturalization); *see generally* 8 U.S.C § 1101 *et seq.*

to benefit" them. *Amgen, Inc. v. Smith*, 357 F.3d 103, 108 (D.C. Cir. 2004) (citation omitted). "Congruence of interests, rather than identity of interests, is the benchmark." *Id.* Here, NWIRP's interest in representing individuals seeking immigration benefits is, by definition, "congruen[t]" with those of its clients. *Cf. Amgen*, 357 F.3d at 109-10 (holding that company was within the zone of interests for a Medicare provision because the company's commercial interest was "congruent with" individual beneficiaries' interests).

The INA's repeated recognition of the role of legal services providers like NWIRP underscores that NWIRP's interests are related to and consistent with those of the INA. *See O.A.*, 404 F. Supp. 3d at 144; *E. Bay Sanctuary Covenant*, 932 F.3d at 768-69. The INA requires the government to give T- and U-visa holders "referrals to nongovernmental organizations to advise [them] regarding their options," 8 U.S.C. § 1184(p)(3) (U visas); *see also id.* § 1101(i)(1) (T visas), and similarly requires asylum seekers to be advised of the privilege of representation and provided a list of pro bono counsel, *id.* § 1158(d)(4). Additionally, the INA requires the government to "seek the assistance of … private voluntary agencies" and others in distributing information about naturalization. *Id.* § 1443(h). Other INA provisions recognize the importance of access to legal information and counsel in removal proceedings. *See, e.g.*, 8 U.S.C. §§ 1228(a)(2), (b)(4)(B), 1229(b)(2), 1229a(b)(4), 1362.

USCIS cites *INS v. Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U.S. 1301 (1993) (O'Connor, J., in chambers) (*LAP*), and *Federation for American Immigration Reform, Inc. v. Reno*, 93 F.3d 897 (D.C. Cir. 1996) (*FAIR*), *see* Dkt. 25-1 at 31, but neither "supports a contrary conclusion," *O.A.*, 404 F. Supp. 3d at 145 n.14. "Justice O'Connor's in chambers opinion in *LAP* reflects the views of a single Justice relating to a different statute," the Immigration Reform and Control Act of 1986. *Id.* It is non-binding, "speculative," and was

written with only limited analysis. 510 U.S. at 1304. The Supreme Court subsequently emphasized that "the benefit of any doubt goes to the plaintiff," *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225. *FAIR* likewise pre-dates *Match-E-Be-Nash-She-Wish* and addresses a different type of organization (focused on "ensuring that levels of legal immigration are consistent with the absorptive capacity of … local areas") and a different part of the INA (regarding the "parole and adjustment of status of Cuban nationals"). 93 F.3d at 899 (internal quotation marks and citation omitted); *see O.A.*, 404 F. Supp. 3d at 145 n.14.

B. The Policy Manual revision, like the other challenged actions, is a reviewable final agency action.

USCIS contends that the Policy Manual revision, which would add new material on fees and fee waivers and supersede earlier documents, is not reviewable final agency action. *See* Dkt. 25-1 at 32.[3] USCIS is wrong because like the other actions at issue (whose finality USCIS does not dispute), the revision "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow," *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted).

USCIS does not dispute that the Policy Manual revision satisfies that first *Bennett* factor. *See* AR484 (showing adoption). USCIS mischaracterizes its own material in arguing that the second *Bennett* factor is not present because the Policy Manual revision "merely restate[s]" the

[3] The Policy Manual supersedes sections 10.9 and 10.10 of the Adjudicator's Field Manual and related documents. *See* AR484. Section 10.9 is in the 2011 Memorandum, AR45-50, and both sections are at: USCIS, *Adjudicator's Field Manual-Redacted Public Version*, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html (visited Feb. 28, 2020).

requirements of the new I-912 form and its instructions, Dkt. 25-1 at 32. The Policy Manual revision extends beyond the 2019 Standard. For instance, unlike the 2019 Standard, the revision prohibits USCIS officers from issuing requests-for-evidence (RFEs) to allow applicants to supplement any incomplete fee-waiver requests, and it instructs officers on other aspects of adjudicating and denying fee-waiver applications. *See* AR508-10. The revision also states a newly worded (and unexplained) interpretation of 8 U.S.C. § 1255(*l*)(7), the statutory provision that requires DHS to permit fee-waiver applications from individuals seeking certain humanitarian benefits. *See* AR499; *compare id.* with AR46 (discussion of § 1255(*l*)(7) in 2011 Memorandum). Additionally, the Policy Manual restricts USCIS from reprocessing certain bounced checks, *compare* AR491-92 *with* 8 C.F.R. § 103.2(a)(7)(ii)(D); states that parents or guardians signing for children or incapacitated adults must provide documentation of their relationship and authority to sign, *see* AR496; and designates acceptable documentation from a child in foster care, AR505. *See generally* Dkt. 11 at 19, 25; Dkt. 9 at 14 (First Am. Compl. ¶¶ 67-68).

Accordingly, the Policy Manual revision is one from which "legal consequences will flow." *Bennett*, 520 U.S. at 178. For instance, without the option to issue RFEs, USCIS may deny fee-waiver applications with easily cured deficiencies, and in turn, return the underlying benefits applications. *See* Dkt. 11-1 at 8 (Barón Dec. ¶ 34); *cf.* 8 C.F.R. § 103.2(b)(8)(ii) (discussing RFEs for benefits requests). The interpretation of 8 U.S.C. § 1255(*l*)(7) could mean the agency seeks to *change* which forms are fee-waiver eligible (though, absent explanation, the unclear wording obscures the agency's intent). *See* Dkt. 11 at 47; Dkt. 11-1 at 8 (Barón Dec. ¶ 35).

The Policy Manual revision also satisfies the *Bennett* standard because it has independent legal effect on individuals' eligibility for fee waivers. The Policy Manual is "a document issued at headquarters [that] is controlling in the field," on which USCIS would "base[] enforcement" of

fee-waiver standards, and that would "lead[] private parties … to believe that" USCIS would find a fee-waiver request "invalid unless they comply with [its] terms"—even if USCIS had *not* issued the 2019 Standard. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000). The Policy Manual's instructions, like those of the predecessor documents, are binding on USCIS staff. *See generally* Dkt. 9 at 5, 15 (First Am. Compl. ¶¶ 23, 69).[4] Moreover, both the new and prior documents instruct officers about how to process fee-waiver requests *without* incorporating the terms of the I-912 form and instructions by reference. *See* AR491-514 (new Policy Manual material); AR45-50 (chapter 10.9 of Adjudicator's Field Manual). Thus, even without the revision to the I-912 form (or with no form instructions at all), the Policy Manual revision would instruct USCIS officers to evaluate fee-waiver requests based on whether applicants satisfy an income or hardship criterion. And by the same token, without the Policy Manual revision, USCIS officers would remain instructed to follow the rubric set out in the 2011 Memorandum, *not* the 2019 Standard. The Policy Manual revision, therefore, "withdraws some of the discretion" that USCIS officers otherwise would have, *Scenic Am., Inc. v. DOT*, 836 F.3d 42, 56 (D.C. Cir. 2016).

C. NWIRP's claim relating to the PRA is actionable under the APA.

USCIS argues that its failure to comply with the PRA is not actionable because the PRA includes no private right of action. *See* Dkt. 25-1 at 33-34. But NWIRP brings this claim under the APA, which provides a cause of action to challenge "[a]gency action made reviewable by statute

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[4] *See* USCIS, *Policy Manual* (Mar. 11, 2020), https://www.uscis.gov/policy-manual (at "About the Policy Manual," stating it "is to be followed by all USCIS officers"); USCIS, *Adjudicator's Field Manual-Redacted Public Version, Adherence to Policy*, ch. 3.4, pt. b, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-728/0-0-0-789.html#0-0-0-244 (stating the policy material is "binding" on staff "unless or until" "specifically superseded," and even if a higher authority appears to exist, clarification should be sought).

and final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704. *See* Dkt. 9 at 26, 27 (First Am. Compl. ¶¶ 114, 119); *see generally Oryszak v. Sullivan*, 576 F.3d 522, 525 (D.C. Cir. 2009) (discussing APA cause of action and explaining that, contrary to USCIS's suggestion, its applicability is not jurisdictional). The APA's cause of action is available to challenge agency actions that violate statutes even when the violated statutes include no private right of action. *See, e.g.*, *Bennett*, 520 U.S. at 174 (concluding that claim is not reviewable under a provision of the Endangered Species Act, but going on to inquire whether it is reviewable under the APA); *Venetian Casino Resort, L.L.C. v. EEOC*, 530 F.3d 925, 931-32 (D.C. Cir. 2008) (recognizing that violation of Trade Secrets Act is actionable under the APA although Trade Secrets Act has no private right of action). Actions like USCIS's that violate the PRA are no exception to this rule. *See, e.g.*, *Taylor v. FAA*, 895 F.3d 56, 69 (D.C. Cir. 2018) (on petition for review of rule, considering, but rejecting on merits, a claim that the rule violated the PRA); *Nat'l Women's Law Ctr. v. OMB*, 358 F. Supp. 3d 66 (D.D.C. 2019) (appeal pending) (granting summary judgment to plaintiff on APA claim that Office of Management and Budget (OMB) violated PRA). Indeed, the PRA could only supersede or modify NWIRP's APA cause of action if the PRA did so expressly, and the absence of a private right of action has no such effect. *See* 5 U.S.C. § 559 (regarding statutes post-dating the APA); *see generally* Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat 163 (showing that PRA postdates the APA). None of USCIS's cases suggest otherwise; they do not discuss the actionability of claims like NWIRP's under the APA.

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

Last year, USCIS described the 2019 Standard as "abrogating" part of the fee waiver "eligibility" standard, AR243 (Sept. Resp. ¶ 3), in order to "curtail[]" fee waivers, 84 Fed. Reg. at

26139.[5] Now, USCIS contends that the 2019 Standard is merely "technical." Dkt. 25-1 at 37. USCIS cannot have it both ways. Because, in fact, the rule "alter[s] the rights or interests" of immigrants by establishing mandatory, narrower fee-waiver eligibility criteria, and does not attempt to explain the meaning of *any* term, *Mendoza*, 754 F.3d at 1023 (citation omitted), the 2019 Standard is a substantive rule that USCIS could not lawfully adopt with the notice-and-comment procedures in section 553 of the APA. The APA's narrow exceptions for procedural or interpretive rules are inapplicable here. *See* Dkt. 11 at 29-34.

A. The 2019 Standard is not a procedural rule.

In trying to paint the 2019 Standard as procedural, USCIS ignores that the exception applies only to measures "*primarily* directed toward improving the efficient and effective operations of an agency," *Mendoza*, 754 F.3d at 1023 (citation omitted, emphasis added). The 2019 Standard is nothing of the sort. It dictates "formalized criteria" that "determine whether claims for" fee waivers "are meritorious" and affect immigrants' access to life-changing benefits. *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974); *see* Dkt. 11 at 11-14, 29.

NWIRP earlier explained that the 2019 Standard is akin to other substantive rules. *See* Dkt. 11 at 29-30, 31. USCIS's cases underscore this point by describing other substantive rules that are

[5] USCIS submitted three documents to OMB purporting to summarize and respond to the comments received after USCIS's September 2018, April 2019, and June 2019 PRA notices ("September Response," "April Response," and "June Response"). For ease of reference, when referring to these documents, NWIRP cites both the administrative record page number and the paragraph number (for the September Response) or the spreadsheet row number (for the April and June responses). The row numbers are not visible in the administrative record, but they are visible in the spreadsheet formats posted online, 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=201910-1615-006 (visited Feb. 26, 2020).

analogous to the 2019 Standard. For example, *James V. Hurson Associates, Inc. v. Glickman*, 229 F.3d 277 (D.C. Cir. 2000) distinguishes a rule that would "alter the substantive criteria" for approving food-labeling proposals from one that does not and is thus procedural, *id.* at 281. Likewise, *JEM Broadcasting Co. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994), recognizes that changes to "financial qualifications" for licenses would be the type of change in "*substantive standards*" that would require notice-and-comment rulemaking, *id.* at 327. The 2019 Standard makes just the type of substantive changes these cases describe, by altering the financial circumstances that establish whether individuals are eligible for fee waivers or not. Another case USCIS cites, *American Hospital Association v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987), recognizes that "insert[ing] a new standard of review" or "a presumption of invalidity" into an enforcement plan "would surely require notice and comment," *id.* at 1051. Again, that is precisely what the 2019 Standard does by deeming benefits-based applications invalid and designating a narrowed fee-waiver eligibility standard.[6] And because the 2019 Standard is analogous to the *American Hospital* examples, it "encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior," in the meaning of that case, *id.* at 1047.

The 2019 Standard is also comparable to another rule deemed substantive under the *American Hospital* formulation that USCIS cites. *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989)

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[6] Although USCIS describes *National Security Counselors v. CIA*, 931 F. Supp. 2d 77 (D.D.C. 2013), as regarding a fee structure, that case is different than this one. In dismissing a notice-and-comment claim concerning a rule setting fees for seeking the declassification of documents, the court deemed the question close, *id.* at 112, and noted, among other things, that the complaint was silent on the interests at stake, *id.* at 109. Here, the interests are clear: the 2019 Standard affects individuals' access to fee waivers and vital immigration benefits. *See* Dkt. 11 at 11-14 (discussing importance of fee waivers to immigration benefits).

(per curiam), concluded that a rule "encode[d] a substantive value judgment" and was thus substantive when, similarly to the 2019 Standard, it stated minimum "substantive criteria" that radio-station proposals (regarding frequency allotment) had to satisfy in order even to be considered, *id.* at 1304-05.[7]

The impact of the 2019 Standard reinforces that it is a substantive rule. The standard determines which individuals receive fee waivers, and fee waivers affect immigrants' access to benefits enabling them to live, work, and naturalize in the United States. *See* Dkt. 11 at 11-14, 25-26; *see also* 75 Fed. Reg. 58962, 58970 (Sept. 24, 2010) (discussing importance of fee waivers); 81 Fed. Reg. 73292, 73297 (Oct. 24, 2016) (similar); 84 Fed. Reg. 62280, 62333 (Nov. 14, 2019) (similar). These substantive effects go far beyond the "increased burden" that USCIS notes, Dkt. 25-1 at 39, and USCIS errs in attempting to dismiss them. Because they are so "grave," 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) (*Lamoille Valley R. Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983)). Though USCIS focused on novelty, what matters is the "degree" of impact on substantive interests. *Id.* at 5. Here, it is severe. *See 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). *See* Dkt. 11 at 31-32.

USCIS attempts to escape the import of its action by likening its adoption of the 2019 Standard to its 2010 discussion of the future I-912 form. *See* Dkt. 25-1 at 36-37. USCIS's account

[7] Courts can determine that a rule is substantive without using this formulation. *See, e.g.*, *Mendoza*, 754 F.3d at 1023-24.

of the 2010 form is incomplete, however; it fails to discuss, among other things, the 2011 Memorandum that made clear that both the I-912 form and its instructions about income and hardship documentation were optional. *See* AR46-47. In any case, the agency's 2010 action does not affect whether USCIS's 2019 action was lawful.

Equally unavailing is USCIS's suggestion that because its *regulation* still refers to applicants' inability to pay, the substantive fee-waiver standard remains unchanged. *See* Dkt. 25-1 at 37. That may be true "at a high enough level of generality," but such an "overly abstract account … elides" what is at stake. *Elec. Privacy*, 653 F.3d at 6. What matters is a "practical account of" the 2019 Standard, *Mendoza*, 754 F.3d at 1024. At its core, and by express design, the 2019 Standard changes and narrows which immigrants are *substantively* eligible for fee waivers. It thus falls outside the APA's narrow procedural-rule exception.

B. The 2019 Standard is not an interpretive rule.

USCIS's fallback argument is that the 2019 Standard is interpretive. But the rule also falls outside this narrow exception, as it states mandatory requirements that USCIS "'intended' to speak with the force of law" and that cannot reasonably be deemed a mere explanation of an existing regulatory term, *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 18 (D.C. Cir.) (citation omitted), *judgment entered*, 762 F. App'x 7 (D.C. Cir. 2019), and *cert. denied*, No. 19-296, 2020 WL 981797 (U.S. Mar. 2, 2020). *See* Dkt. 11 at 32-34.

USCIS's own confusion about its rule proves the point. In the administrative process, USCIS argued that APA procedures were unnecessary because it was interpreting "inability to pay." AR242 (Sept. Resp. ¶ 3). Now, USCIS flips between that characterization, *see* Dkt. 25-1 at 43, and a new one: the notion that the 2019 Standard interprets "written request" and "evidence" as well, *see id.* at 41. The new characterization cannot be credited: "courts may not accept [legal]

counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Moreover, if USCIS cannot itself decide what terms the rule "explain[s] or clarif[ies]," *Chamber of Commerce of U.S. v. OSHA*, 636 F.2d 464, 469 (D.C. Cir. 1980), it can hardly claim credibly that the rule is one that "simply communicates the agency's interpretation of what" its fee-waiver regulation "has always meant," as an interpretive rule would. *Guedes*, 920 F.3d at 19. *Cf. United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989) (rejecting argument that rule is interpretive as "disingenuous and late" when "[t]here is no indication that the [agency] even intended [it] as a construction of the [relevant] regulation").

The *American Mining Congress* formulation that USCIS cites, *see Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); Dkt. 25-1 at 41, reinforces that the 2019 Standard is a legislative rule. The *American Mining Congress* factors are irrelevant when "a rule … does not purport to interpret *any* language in a statute or regulation," because in those circumstances, a rule is legislative. *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 96 (D.C. Cir. 1997). That is the case here, in all relevant respects. As NWIRP earlier explained, USCIS based the 2019 Standard on considerations other than individuals' ability to pay fees. It cited a variety of potential factors, none of which regarded the affordability of immigration filing fees. *See* Dkt. 11 at 32-33, 35-37. USCIS protests that it recognized that states' standards for issuing means-tested benefits can vary. *See* Dkt. 25-1 at 43. But any variance among states' benefits standards does not explain what it *means* to be unable to afford USCIS fees. Thus, while the 2019 Standard constitutes *implementation*, it does not constitute *interpretation*. *See Chamber of Commerce of U.S. v. OSHA*, 636 F.2d at 469 (distinguishing a legislative rule, which implements, from an interpretive rule, which interprets).

Additionally, the 2019 Standard satisfies the first and fourth *American Mining Congress* factors (only one of which is necessary to establish that a rule is legislative, *see* 995 F.2d at 1112). The rule "effectively amends" the existing fee-waiver rule, 8 C.F.R. § 103.7(c), 995 F.2d at 1112, because with its precise criteria for financial circumstances established by specified documentation, the 2019 Standard "cannot fairly be seen as interpreting" the phrase "unable to pay" (or the other terms USCIS now references), *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010); *see* Dkt. 11 at 34-35. Similarly, without the 2019 Standard, "there would not be an adequate legislative basis for enforcement action" for failure to comply with the rule, *Am. Mining Cong.*, 995 F.2d at 1112, as the detailed scheme does not "flow fairly from the substance of" the existing regulation, *Catholic Health*, 617 F.3d at 494 (citation omitted). For instance, without the 2019 Standard, the agency would have no basis for denying a fee waiver to an applicant simply because the applicant failed to provide tax transcripts (despite providing other, uncontested documentation). Without the 2019 Standard, the agency would have no basis for denying a fee waiver solely because an applicant did not answer questions on the I-912 form about household members' tax filing history. *See* Dkt. 11-2 at 6 (question 5). And without the 2019 Standard, the agency would have no basis for denying a fee waiver solely because the applicant's household income was 151 percent of the federal poverty guidelines, even though she was still unable to scrape together an extra $1,140 to apply for permanent residence, plus another $750 for a child. *See* 8 C.F.R. § 103.7(b)(1)(i)(U).

For these reasons, this case is not like *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 707 F.2d 548 (D.C. Cir. 1983), which USCIS cites, *see* Dkt. 25-1 at 42. That case involved a retiree benefit formula. The statute defined "the computation factors to be used," including "average pay." 707 F.2d at 559. An agency rule concluded that the term "average pay"

reflected "only pay actually earned," rather than a broader measure used by the agency earlier. *Id.* The D.C. Circuit held that the agency correctly characterized its rule as interpretive, based on two factors not present here. First, the court concluded that the earlier, alternative formulation was intended to be an interpretive rule, based on an examination of the earlier formulation's origin and the court's understanding that it stemmed from a Comptroller General opinion about the meaning of a related term. *Id.* at 551, 559. Second, the court concluded that the new rule met "the classic definition of an interpretative rule" because it described "'what the administrative officer [thought] the statute or regulation mean[t].'" *Id.* at 559 (citation omitted).

Here, the 2019 Standard does not evidence any conclusion by the agency about what the regulation *means*. *See* Dkt. 11 at 32-34. Additionally, there is no comparable history of similar interpretive action. Although USCIS again mentions the first I-912 form, this time characterizing it as interpretive, *see* Dkt. 25-1 at 42, that characterization is wholly conclusory. USCIS also does not explain its origin in full, discuss the later evolution of the form, or address the distinctions between USCIS's 2019 Standard—which dictates mandatory requirements—and statements in the 2010 form, which were optional under the 2011 Memorandum, *see* AR46-47.

C. USCIS's failure to use APA rulemaking procedures was prejudicial.

USCIS's error, of "seek[ing] to promulgate a rule by another name," is the "most egregious" type of notice-and-comment violation. *Allina Health Svcs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014). USCIS's "utter failure to comply with notice and comment cannot be considered harmless." *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002). Especially because the 2019 Standard did not reflect the "only reasonable" approach (or even *any* reasonable approach), *id.*, the Court "cannot say with certainty whether" comments

responding to a notice of proposed rulemaking under the APA "would have had some effect," *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988).

Although USCIS protests that it published PRA information-collection notices and made changes to its proposal, *see* Dkt. 25-1 at 35, a failure to conduct notice-and-comment rulemaking is not rendered harmless because the agency received input through another mechanism. *See, e.g.*, *Sugar Cane Growers*, 289 F.3d at 96-97 (informal consultation, where agency made changes in response to plaintiffs' concerns); *McLouth*, 838 F.2d at 1322-23 (notice describing calculation model at issue and inviting comments but not fully alerting "a reader to the stakes"). If agencies could "skip" notice-and-comment procedures, engage in some alternative, and "then be protected from judicial review unless a petitioner could show a new argument," that would mean "virtually repeal[ing] section 553's requirements." *Sugar Cane Growers*, 289 F.3d at 96. That concern applies with particular force here because Congress made clear that a PRA notice does not substitute for an APA notice of proposed rulemaking (NPRM). The PRA allows NPRMs to stand in for PRA notices, in certain cases, but Congress did not allow the converse: that a PRA notice stand in for an NPRM. *See* 44 U.S.C. § 3506(c)(2)(B). Moreover, like the notices in *McLouth*, USCIS's sparse PRA notices did not fully alert readers to the stakes. All three were misleading. The first two stated (wrongly) that USCIS was reducing evidentiary requirements; none alerted readers that USCIS was replacing its earlier, flexible approach with burdensome new documentation requirements; none included the full scope of reasons that USCIS later asserted in its submission to OMB; and all directed commenters to address four narrow questions related to burden and the PRA standard. *See* 83 Fed. Reg. 49121 (Sept. 28, 2018); 84 Fed. Reg. 13687 (Apr. 5, 2019); 84 Fed. Reg. 26137; *see also* Dkt. 11-1 at 35-37.

Thus, USCIS is wrong to suggest that NWIRP needs an additional showing of how the agency's "error affected the … outcome or prejudiced NWIRP." Dkt. 25-1 at 35. No "showing of actual prejudice" is necessary to establish that an error like USCIS's was prejudicial. *Sprint Corp. v. FCC*, 315 F.3d 369, 376-77 (D.C. Cir. 2003); *see also Sugar Cane Growers*, 289 F.3d at 96-97 (holding that plaintiff does not have to identify a new argument it would have made in response to a proper rulemaking proposal to establish that a rule issued without required notice-and-comment is prejudicial); *see generally Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010) ("If the prejudice is obvious to the court, the party challenging agency action need not demonstrate anything further."). In any case, NWIRP's opening brief amply "demonstrat[es] that [NWIRP] had something useful to say" that it could not raise in response to USCIS's PRA notices. *Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 905 (D.C. Cir. 2006). NWIRP's explanation of why the 2019 Standard is arbitrary and capricious responds to the data (or lack thereof) and reasoning in USCIS's submissions to OMB and the administrative record. *See generally* Dkt. 11-1 at 5 (Barón Dec. ¶ 25) (stating that NWIRP would have commented on OMB submission if it had been made available for comment). If USCIS had proceeded under the APA, it would have had to describe its rationales and its data (or lack thereof) in the NPRM. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. FMCSA*, 494 F.3d 188, 199 (D.C. Cir. 2007); *Nat'l Cable Television Ass'n, Inc. v. FCC*, 747 F.2d 1503, 1507 (D.C. Cir. 1984).

IV. The 2019 Standard is arbitrary and capricious.

A. USCIS offered a series of shifting explanations for the 2019 Standard. Jumbled, incomplete, and unsupported by data, USCIS's muddle of assertions reflect decision-making that is arbitrary and capricious. *See* Dkt. 11 at 35-40.

USCIS now cherry-picks phrases from its Federal Register notices and the material it submitted to OMB, identifies those as USCIS's true concerns, and suggests that the Court should ignore the variety of other statements that USCIS made in its OMB submission, including that it prohibited all benefits-based applications because (1) many applicants submitted the wrong paperwork, *i.e.*, proof of "public benefits that are not means tested," AR323 (Apr. Resp. at row 70); and (2) commenters held "the strong desire" "to retain the means tested benefit policy" and the agency concluded that such desire, combined with other factors, meant that "means-tested benefits" are *not* "good indicators of true inability to pay," *id.* (Apr. Resp. at row 71). *See* Dkt. 25-1 at 12, 47. But counsel's post-hoc editing of the agency's prior statements does not substitute for reasoned decision-making in the first instance. This Court must judge the 2019 Standard "on the basis articulated by the agency" at the time. *State Farm*, 463 U.S. at 50. And when reviewing the agency's earlier statements, this Court cannot "be expected to chisel that which must be precise from what the agency has left vague and indecisive." *SEC v. Chenery Corp.*, 332 U.S. 194, 197 (1947). "Arbitrary and capricious review strictly prohibits" a court "from upholding agency action based only on [the court's] best guess as to what reasoning truly motivated it." *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 328-29 (D.C. Cir. 2006); *see also id.* at 329-30 (declining to uphold action on one of two bases asserted, when one was unsupported).

Even USCIS's highlighted phrases do not constitute a reasoned basis for the 2019 Standard. USCIS urges deference to its statements, but deference on APA review does not mean that a court "simply accept[s] whatever conclusion an agency proffers merely because the conclusion reflects the agency's judgment." *Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006). This Court must "ascertain that the agency has made

a reasoned decision based on reasonable extrapolations from some reliable evidence." *Id.* at 83 (citation omitted). Here, USCIS identifies no evidence supporting the statements it identifies.

For instance, the agency states that its true concern was about forgoing "increasing amounts of revenue" and needing "to increase the fees it charges," without the 2019 Standard. Dkt. 25-1 at 47. But, as NWIRP has explained and USCIS does not dispute, no record data shows that the 2019 Standard would avoid a fee increase. *See* Dkt. 11 at 38. Additionally, the record shows that the annual dollar volume of fees waived *fell* about 20 percent from 2017 to 2018, the most recent period reflected; USCIS did not address this data. *See id*; AR405 (June Resp. at row 73).[8]

USCIS also fails to identify record evidence supporting the other statements it emphasizes in briefing: (a) its suggestion that it is now requiring applicants to submit tax transcripts because the fee-waiver process had been marked by incomplete or unsigned tax returns and a risk of fraud, and (b) its assertion that it eliminated benefits-based applications because variance among states' benefits standards resulted in inconsistency in fee-waiver grants. For instance, as NWIRP earlier explained, the record contains no information about incomplete or unsigned tax forms or fraud. Also, the record does not show any comparison between the incomes earned by individuals receiving fee waivers under the current practice and those who would receive fee waivers under the new practice. Further, comments in the record undermined USCIS's claim about consistency. Among other things, they explained that states' means-tested benefits standards are *appropriately* consistent, because to the extent they vary, they reflect differences among local living costs. *See*

[8] Pre-2017 data is of limited relevance due to USCIS's December 2016 fee increase. *See* Dkt. 11 at 38 n.9. Notably, however, between 2016 and 2017, the dollar amount of fees waived increased, but only about 7 percent, far less than the 21 percent weighted average increase in fees. *See* 81 Fed. Reg. at 73292 (AR89); *see also* AR405 (June Resp. at row 73).

Dkt. 11 at 38-40; *see also* AR523, 525, 1116, 1148, 1287-88, 2015, 2494-95, 5250-51. Additionally, USCIS did not explain its change in position, *see* Dkt. 11 at 38; USCIS's suggestion in briefing that it learned only recently about variances in states' benefits standards, *see* Dkt. 25-1 at 16, has no support. Thus, USCIS errs in suggesting it made a "finding" regarding "inconsistent outcomes across the Nation," and that NWIRP does not contest such finding, *see* Dkt. 25-1 at 47 n.13. Its *post hoc* defense of the federal poverty guidelines, *see id.*, is beside the point and should be ignored.

B. NWIRP's opening memorandum explained a number of other ways in which USCIS failed to provide a reasoned explanation for the 2019 Standard. To the extent USCIS even responds, its arguments are meritless.

First, USCIS's other attempts to justify the 2019 Standard are incomplete and unsupported on a variety of other grounds. *See* Dkt. 11 at 37-40. In response to NWIRP's showings, USCIS attempts to defend only one aspect of the 2019 Standard: the requirement that family members file separate, rather than combined, fee-waiver requests for related benefits applications. *See* Dkt. 25-1 at 49. Even that effort falls flat, as the agency repeats its conclusory statement that the measure would reduce rejections and does not point to supporting data in the record. *See id*. USCIS's assertion that, across applicants, the impact would be "limited," *id.*, begs the question why the change is necessary and ignores the impact on those individuals who *will be* affected, *see, e.g.*, AR2495, 3258, 4320-21, 5255-56.

USCIS's contention that one point in NWIRP's brief is time-barred, because it references the 2019 Standard's income and hardship criteria, is meritless. *See* Dkt. 25-1 at 48. NWIRP challenges USCIS's 2019 conclusion that these criteria *alone* are sufficient to identify individuals unable to pay fees, not any earlier decision that USCIS *should* provide fee waivers to individuals

satisfying these criteria. Whether interpreting "inability to pay" in an interpretive rule or implementing it through a legislative rule, USCIS should have explained, with reasoning, why it reached this determination; it did not. *See* Dkt. 11 at 39.

Second, USCIS ignored important factors, including individuals' inability to pay USCIS fees, the harm the 2019 Standard will cause, and the interactions between the 2019 Standard and other changes that USCIS is making to the regulatory environment. *See* Dkt. 11 at 40-44. USCIS suggests that its assertion about variation among states' benefits standards and its retention of the pre-existing income standard constituted consideration of immigrants' ability to pay fees. *See* Dkt. 25-1 at 49-50. But, once again, nothing in the record connects either consideration to an evaluation of individuals' ability to pay fees. *See supra* pp. 25, 32-33. Relatedly, USCIS errs in suggesting that it was appropriate to consider the volume of fees waived. USCIS notes that its *statute* refers to budget considerations. *See* Dkt. 25-1 at 51. But here, USCIS has insisted that it is interpreting or procedurally implementing its fee-waiver *regulation*, which references applicants' inability to pay, not the impact of fee waivers on USCIS's budget. *See* 8 C.F.R. § 103.7(c)(1)(i). USCIS's unsupported assertions about recouping its expenses do not relate to which individuals can afford USCIS fees.

USCIS also failed to "reflect upon" and "grapple with" commenters' explanations of the harm the 2019 Standard would cause, *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017). Contrary to USCIS's suggestion, NWIRP does not argue that the 2019 Standard is arbitrary and capricious *because* it is burdensome. *See* Dkt. 25-1 at 50. NWIRP's point is that USCIS repeatedly evaded commenters' concerns about the standard's harmfulness or responded with assertions that were conclusory, internally inconsistent, unsupported, or contrary to facts in the record. *See* Dkt. 11 at 41-43. USCIS now reacts to NWIRP's showings with more conclusory

statements and an invocation for deference, *see* Dkt. 25-1 at 50, which do not address NWIRP's arguments and misrepresent the law. *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291 (D.C. Cir. 2003), which USCIS cites, does not suggest any circumstance that excuses an agency from considering comments or supporting its conclusions with evidence. *Consumer Electronics* simply recognizes that a tenet of administrative law—that "a court is not to substitute its judgment for that of the agency," 374 F.3d at 303 (citation omitted)—applies when a court evaluates an agency's estimates of an action's costs and benefits. Similarly, *AFL-CIO v. Donovan*, 757 F.2d 330 (D.C. Cir. 1985), cited elsewhere by USCIS, *see* Dkt. 25-1 at 46, does not suggest that a rule regarding an exemption receives greater deference than any other. The cited passage points to the same arbitrary and capricious standard on which NWIRP's arguments are based, making only a distinction between this standard and the lesser deference given to rules that are *not* legislative. *See id.* at 343.

USCIS also does not justify ignoring the regulatory context created by other USCIS measures. As NWIRP earlier explained, the agency's "public charge" rule, which will deter immigrants from seeking public benefits, *see* 84 Fed. Reg. 41292, 41310-14 (Aug. 14, 2019), or its pending rulemaking regarding fees, which would remake fee-waiver eligibility criteria, *see* 84 Fed. Reg. at 62280, 62298-301 (November proposal), could accomplish USCIS's apparent goal—of reducing benefits-based fee-waiver applications—without the 2019 Standard. But USCIS did not consider the effect of either. *See* Dkt. 11 at 43-44. USCIS responds by quibbling about the relative timing of its various actions; asserting that neither of these other rulemakings is "certain to occur"; and noting that it wanted to cut back fee waivers sooner than it could adopt a fee rule. *See* Dkt. 25-1 at 50-51. But these assertions do not justify USCIS's failure to consider its other measures altogether. The "public charge" rule was proposed in October 2018 and adopted in

August 2019. *See* 84 Fed. Reg. at 41292, 41296. The November proposal also was far from hypothetical on October 16, 2019, when USCIS decided to submit its proposed I-912 form changes to OMB for approval, and the following week, when USCIS decided to adopt the 2019 Standard. *See* AR461, 484; Dkt. 11-2 at 4-24 (showing dates). By that time, the rulemaking proposal was essentially complete. *See* Dkt. 11 at 21-22 (explaining timing). And even earlier, by April 2019, the agency had completed the review of financial accounts to support the November proposal, and that review recognized the fee-waiver measures included in the proposal. *See* USCIS, *Immigration Examinations Fee Account, Fee Review Supporting Documentation* 5 (Apr. 2019), https://www.regulations.gov/document?D=USCIS-2019-0010-0007 (in docket for November proposal). In short, the agency failed to engage in reasoned decision-making because it took several policy actions around the same time, without considering the potential interactions among, or cumulative effects of, *its own actions*. *Cf. Pub. Citizen v. Steed*, 733 F.2d 93, 104-05 (D.C. Cir. 1984) (holding that rule was arbitrary and capricious because agency adopted it without adequately explaining its failure to act on a related, more measured rulemaking proposal).

Third, USCIS credited an inappropriate factor when it focused on "the strong desire of commenters for [USCIS] to *retain* the means tested benefit policy" (emphasis added) and characterized that as evidence that "means tested benefits are too easy to obtain" and thus a reason that means-tested benefit applications should *end*, AR323 (Apr. Resp. at row 71). *See* Dkt. 11 at 45. USCIS's footnote response, that it has authority to evaluate the utility of certain types of evidence, misses the point. *See* Dkt. 25-1 at 51 n.14. NWIRP's concern is that USCIS abused the comment process by, in effect, punishing commenters for commenting too passionately. To this, USCIS has no response.

Fourth, USCIS failed to consider alternatives. *See* Dkt. 11 at 45-46. USCIS protests that the alternatives mentioned in NWIRP's opening brief were not raised earlier. *See* Dkt. 25-1 at 52. But that is not the case. Further, alternatives can be made obvious through a variety of mechanisms, not simply comments. *See, e.g.*, *State Farm*, 463 U.S. at 51 (holding that, in rescinding a prior rule, an agency should have considered an alternative because it was "within the ambit of the existing standard"); *cf. Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 389 (D.C. Cir. 2018) (recognizing an agency's "affirmative burden of examining a key assumption" in rulemaking, "even if no one objects during the comment period" (cleaned up)). When alternatives are obvious and reasonable, as they are here, the agency's failure to address them renders its action arbitrary and capricious. *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987).

For instance, as NWIRP explained, the agency should have considered measures far less drastic than eliminating benefits-based applications and requiring individuals to obtain tax transcripts, if USCIS's concern was that individuals were submitting unsigned tax forms or proof of benefits that were not means tested. *See* Dkt. 11 at 45-46. Commenters identified alternatives that USCIS did not meaningfully consider. For example, they mentioned clarifying the form's instructions, which could include expressly requiring tax forms to be signed (an alternative so plain, in the context of a form change, as to not require any commenter to raise it), *see* AR3309 n.7, and allowing the submission of other evidence of income, including documentation from employers or government agencies and types of evidence that USCIS already accepts, *see* AR1578-79, 2105, 2353, 2498, 2546, 2548, 2549-50, 3349-50. A third alternative, using RFEs to address deficiencies, was also obvious, and thus before the agency, because RFEs reflect a "familiar tool in [USCIS's] tool kit" and were directly implicated by the Policy Manual revision, which prohibits USCIS officers from issuing RFEs to resolve fee-waiver application deficiencies.

Chamber of Commerce of U.S. v. SEC, 412 F.3d 133, 144 (D.C. Cir. 2005) (holding that agency should have considered alternative raised by dissenting commissioners and involving a "familiar tool"); *see* AR508 (Policy Manual revision); *cf.* 8 C.F.R. 103.2(b)(8)(ii) (regarding RFEs for benefits requests). A commenter also raised the possibility, by urging USCIS to request additional documentation if it has concerns about an applicant's eligibility. *See* AR4301.

Similarly, if USCIS were truly concerned about the variability among states' benefits standards, it should have considered alternatives less harmful than eliminating all benefits-based applications, since those types of applications have been the most straightforward mechanism of seeking fee waivers. *See* Dkt. 11 at 16-17, 46. In response to USCIS's PRA notices, commenters raised or implied a variety of options—not meaningfully considered by USCIS—that could have retained benefits-based eligibility for programs whose requirements are consistent with the 150-percent income-standard. For instance, one suggested "limit[ing] the eligibility to programs that are applied more uniformly across the United States" rather than eliminating benefits-based eligibility altogether. AR1288; *see also* AR2588 (similar). Others showed that benefits eligibility can correspond with the existing income standard. They noted that some benefits programs have income-eligibility caps lower than USCIS's; showed existing benefits documentation that can establish that individuals fall below a designated income level; and described individuals who both receive means-tested benefits and fall under USCIS's income-eligibility cap. *See* AR1009, 1578-79, 2105, 2573. Another alternative should have been obvious: USCIS could have raised the income-eligibility cap to match or exceed any higher income criteria used by benefits-granting agencies. This alternative would have been similar to USCIS's approach in 2010, when it set out the 150-percent income criterion based on comments stating that this was a commonly-used standard for determining means-tested benefits eligibility. *See* Dkt. 11 at 46 n.12 (citing USCIS,

Supporting Statement, Request a Fee Waiver (Form I-912), OMB No. 1615-New (2010), *available at* https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201007-1615-007). *Cf. State Farm*, 463 U.S. at 51 (holding that agency should have considered alternative "within the ambit of the existing standard"). Indeed, that alternative should have been part of USCIS's explanation of why it changed approach. *See generally Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).[9]

USCIS singles out two of the alternatives that NWIRP mentioned and asserts that they would be "counterproductive." Dkt. 25-1 at 52. But such post- hoc explanations are untimely and do not excuse the agency's failure to consider the identified alternatives in the first place. *See City of Brookings*, 822 F.2d at 1170. Even with regard to the alternatives USCIS mentions now, its explanations are inadequate. It asserts that RFEs would increase the agency's workload, but that contention lacks supporting data and makes no sense, when USCIS suggests that the applicant should instead re-submit an entirely new application. *See id*. at 53; *see also* Dkt. 11 at 14. USCIS's complaint about the expense of monitoring "myriad" benefits standards, *see* Dkt. 25-1 at 53, is a strawman. If USCIS wished to increase consistency in the incomes that would qualify individuals for fee waivers, it could have "maintained fee waiver eligibility based on receipt of means-tested benefits" for several large federal programs with consistent eligibility standards, as commenters implied. AR2588; *see* AR1288.

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[9] USCIS suggests that it considered alternatives by adopting the hardship standard, *see* Dkt. 25-1 at 52. But the hardship standard was part of USCIS's proposal from the start; it does not address commenters' suggestions of alternatives for satisfying the *income* standard or retaining benefits-based applications. And USCIS's suggestion that the hardship standard does not require tax transcripts is not well taken. The 2019 Standard expressly requires individuals with *no* income to obtain and submit IRS documentation. *See* Dkt. 11-2 at 21.

V. Policy Manual revision and abandonment of 2011 Memorandum are unlawful.

USCIS acted arbitrarily and capriciously when it revised the Policy Manual and decided to stop applying the 2011 Memorandum. Both agency actions are arbitrary and capricious for the same reasons as the 2019 Standard; USCIS made no attempts to justify these actions other than its attempts to explain the 2019 Standard. Additionally, as USCIS does not dispute, the agency failed to explain or support the aspects of the Policy Manual revision that go beyond the content of the 2019 Standard. *See* Dkt. 11 at 46-47.

VI. USCIS's revised information collection is unlawful due to PRA failings.

Because USCIS's October 2019 revisions to the I-912 form and its instructions constituted changes to the agency's collection of information regarding fee waivers, USCIS could only lawfully adopt those revisions after complying with the prerequisites listed in the PRA and its implementing regulations. *See generally* 44 U.S.C. § 3507(a), (d), (h)(3), 5 C.F.R. § 1320.5(a)-(d), (g). But USCIS adopted the changes without completing all of those requirements. It did not produce an "objectively supported" estimate of the information collection's burden. 5 C.F.R. § 1320.8(a)(4); *see also id.* § 1320.5(a)(1)(i) (requiring compliance with section 1320.8(a)). Additionally, USCIS did not provide a record supporting the agency's certification that the collection, as revised, complied with certain other requirements, including that it: (a) is "necessary for the proper performance of the functions of the agency," (b) "[r]educes to the extent practicable and appropriate the burden on" immigrants seeking fee waivers, and (c) "[i]s to be implemented in ways consistent and compatible, to the maximum extent practicable" with fee-waiver applicants' "existing reporting and recordkeeping practices." *Id.* § 1320.9(a), (c), (e); *see also id.* § 1320.5(a)(1)(iii)(A) (requiring certification). And for all of these reasons, USCIS also flouted the PRA's requirement to demonstrate that it took "every reasonable step" to ensure that the

revised information collection would meet other related standards, 5 C.F.R. § 1320.5(d)(1). *See* Dkt. 11 at 48-50 & n.14.

These PRA omissions render USCIS's changes to its information collection unlawful in multiple respects. Because USCIS violated PRA requirements, the changes are "not in accordance with law," 5 U.S.C. § 706(2)(A), or were adopted "without observance of procedure required by law," *id.* § 706(2)(D). Additionally, these failures make the information-collection changes arbitrary and capricious, *id.* § 706(2)(A), as they provide other examples of USCIS's reliance on unsupported, conclusory assertions. Whichever aspect of section 706 applies, the result is the same: USCIS's revision to its fee-waiver information collection should be set aside.

In response to NWIRP's arguments, USCIS recites PRA-related material it created: Federal Register notices and documents for OMB. *See* Dkt. 25-1 at 43-44. But it does not acknowledge—let alone rebut—NWIRP's showing of the ways in which USCIS's documentation contravened PRA requirements. And although USCIS trumpets its use of Federal Register notices, even those documents did not comply with the PRA's requirements for the agency to publish two Federal Register notices, *see* 5 C.F.R. §§ 1320.5(a)(1)(iv), 1320.8(d)(1), 1320.10(a), because USCIS's notices rested on inaccurate and misleading descriptions of USCIS's proposal. *See supra* p. 28.

VII. Vacating the challenged actions is the appropriate remedy.

This Court should declare USCIS's challenged fee-waiver actions unlawful and set them aside. Vacatur is the "ordinary result" "[w]hen a reviewing court determines that agency [actions] are unlawful." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citation omitted, first brackets in original). There is no reason to depart from the usual remedy here.

USCIS suggests that declaratory relief or vacatur is not needed because of preliminary relief granted in another case, agreements to hold proceedings in abeyance in other lawsuits, and USCIS's pending November proposal. *See* Dkt. 25-1 at 18-19, 55. But none of these obviate NWIRP's need for final and permanent relief. *Cf. Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002) ("[T]he fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." (citation omitted)); *O.A.*, 404 F. Supp. 3d at 145 ("As the Supreme Court has held, preliminary injunctive relief does not defeat Article III standing" (citing *Nielsen v. Preap*, 139 S. Ct. 954, 963 (2019) (plurality opinion)).

USCIS also has no basis to suggest that the Court should vacate only part of the challenged USCIS actions. *See* Dkt. 25-1 at 54. When only one part of an agency action is unlawful under the APA, this Court can leave others standing, "only if [it] can say without any substantial doubt that the agency would have adopted the severed portion on its own," *ACA Int'l v. FCC*, 885 F.3d 687, 708 (D.C. Cir. 2018) (internal quotation marks and citation omitted), and the remaining components can "function sensibly without the stricken" ones, *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 351 (D.C. Cir. 2019) (citations omitted). But here, NWIRP's arguments generally address USCIS actions in their entirety. Further, USCIS ignores the established standard for considering severability under the APA and makes no attempt to satisfy it. USCIS's brief mentions two aspects of the 2019 Standard as ones it hopes to preserve, but by adopting the 2019 Standard in a single form (with its instructions), USCIS demonstrated that all of its parts are "intertwined." *Id.* (citation omitted). Additionally, the two aspects of the 2019 Standard that USCIS mentions—the requirements to use the revised I-912 form and to submit one form per person—do not function sensibly without the rest of the 2019 Standard. Indeed, keeping either of those aspects would create an entirely new rule, by converting the former I-912 form's *optional*

statements about documentation into *mandatory* requirements. *See* AR46-47 (regarding optional nature of earlier I-912 forms and their statements on documentation). That result would undermine the "fundamental principle that agency policy is to be made, in the first instance, by the agency itself—not by courts, and not by agency counsel." *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 867 (D.C. Cir. 2006) (citation omitted) (recognizing that "courts generally do not attempt … to fashion a valid regulation from the remnants of the old rule" (internal quotation marks and citation omitted)).

Anything short of vacatur would be particularly inappropriate here, since USCIS's errors are serious, and the agency is holding the challenged actions in abeyance until 60 days after the completion of briefing. *See* Jan. 24, 2020 Minute Order.[10] A narrower remedy would have the odd result of permitting USCIS to implement actions only *after* this Court declares them unlawful. It would also unfairly reward USCIS's serious abuse of legal requirements. USCIS admits, Dkt. 25-1 at 50-51, that the agency proceeded with a form change because it did not want to wait for the completion of the rulemaking proposal that it issued nearly simultaneously with the October 2019 fee-waiver actions, *see* Dkt. 11 at 21-22. If the Court failed to vacate USCIS's unlawful actions here, it would suggest that USCIS could shortcut the rulemaking process over and over, using the PRA to rush changes to substantive standards reflected in forms, as long as it also initiated a similar and closely timed rulemaking that it could present as a "remand."

[10] In another case challenging USCIS's recent fee-waiver actions, the parties agreed to leave a preliminary injunction in place and hold proceedings in abeyance until USCIS completes its pending rulemaking regarding fees. *See* Stip. Request to Hold Case in Abeyance; Order, *City of Seattle*, (N.D. Cal. Feb. 10, 2020), ECF No. 76.

USCIS's arguments against a nationwide injunction, *see* Dkt. 25-1 at 53-54, do not apply here. NWIRP asks the Court to declare USCIS's actions unlawful and set them aside. NWIRP reserves the right to "return to the Court for further relief if warranted," *O.A.*, 404 F. Supp. 3d at 154, but does not seek an injunction now because it assumes that the government will comply with any ruling by this Court that its actions are unlawful and should be set aside. As USCIS does not contest, "the APA and controlling D.C. Circuit precedent dictate" that NWIRP's requested remedy, of setting aside USCIS's unlawful actions, is nationwide; any other result would also raise a variety of practical concerns. *Id.* at 152-53; *see also* 5 U.S.C. § 706(2); *Nat'l Min. Ass'n*, 145 F.3d at 1409-10; *see generally* Dkt. 25-1 at 54 (seeking only severance as a limitation on vacatur).

CONCLUSION

For the foregoing reasons, this Court should grant NWIRP's motion for summary judgment; deny defendant's motion to dismiss or, in the alternative, 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, (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, such that the superseded sections remain; and (4) the October 2019 revisions to USCIS's fee-waiver information collection.

Dated: March 13, 2020

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