**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| NORTHWEST IMMIGRANT RIGHTS PROJECT, *et al.*, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. 19-cv-03283-RDM |
| UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*, | ) | |
| Defendants. | ) | |

**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

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## INTRODUCTION

In October 2019, U.S. Citizenship and Immigration Services (USCIS) adopted a new fee-waiver standard that makes it harder for immigrants to seek critical benefits. Plaintiff Northwest Immigrant Rights Project (NWIRP) filed suit against the new standard and related actions and, in December 2019, sought summary judgment. In August 2020, plaintiffs filed a Second Supplemental and Amended Complaint, Dkt. 45, that added new claims regarding the October 2019 fee-waiver actions and challenged the August 2020 Department of Homeland Security (DHS) Fee Rule. This supplemental memorandum addresses the additional claims pleaded in the Second Supplemental and Amended Complaint as they relate to the October 2019 fee-waiver actions.[1]

## BACKGROUND

### I. October 2019 fee-waiver actions

In 2011, USCIS issued a memorandum (2011 Memorandum) setting out a flexible three-part framework for immigrants seeking fee waivers under 8 C.F.R. § 103.7(c) (2020), which states that individuals "unable to pay" are eligible for fee waivers. The 2011 Memorandum explains that individuals can establish their inability to pay by showing that they receive means-tested benefits, earn 150 percent of the federal poverty guidelines or less, or are suffering hardship. And although USCIS adopted a fee-waiver form, the 2011 Memorandum states that the form is optional and that applicants can show their income or hardship in a variety of ways. Dkt. 11 at 15-17; AR 43-50.

[1] This memorandum is supported by the Second Declaration of Laurie Ball Cooper, the Second Declaration of George Escobar, and the Supplemental Declaration of Rebecca Smullin, submitted herewith, as well as declarations submitted earlier: Dkt. 11-1 (Barón Decl.), 11-2 (Smullin Decl.), 50-1 (Second Barón Decl.), 50-2 (Ball Cooper Decl.), 50-3 (Escobar Decl.), and 50-4 (Second Smullin Decl.). Plaintiffs Ayuda and CASA de Maryland adopt NWIRP's earlier briefing and request that NWIRP's motion, Dkt. 11, be considered on behalf of all plaintiffs.

On October 24, 2019, USCIS adopted a new fee-waiver standard (2019 Standard) that restricts eligibility, by eliminating the ability to receive a waiver based on receipt of means-tested benefits and requiring immigrants applying under the narrowed standard to establish eligibility with specified documents, often including Internal Revenue Service (IRS) transcripts. *See* Dkt. 11 at 17-18. *Compare* Dkt. 11-2 at 3-24 (2019 Standard), *with* AR 43-50 (2011 Memorandum) *and* AR 157-178 (prior form). Issued without notice-and-comment rulemaking, *see* 84 Fed. Reg. 26,137, 26,139 (June 5, 2019), the 2019 Standard is reflected in a revised I-912 form and instructions, *see* Dkt. 11 at 20-22; Dkt. 11-2.[2] The following day, October 25, 2019, USCIS issued Policy Manual chapters superseding the 2011 Memorandum and other material. It also set the 2019 Standard, the revised form and instructions, the Policy Manual revision, and retirement of the 2011 Memorandum to take effect on December 2, 2019. *See* AR 484, 491-514; Dkt. 11 at 19-20.

## II. Actions taken by Kenneth Cuccinelli

The October 2019 fee-waiver actions were adopted by Kenneth Cuccinelli, serving as Acting USCIS Director. *See* AR 484 (from "Office of the Director"); Suppl. Smullin Decl. Ex. A at 2 (listing acting directors). Cuccinelli had become Acting Director months before, through leadership shuffles following the June 1, 2019, resignation of Director Lee Francis Cissna. *See L.M-M v. Cuccinelli*, 442 F. Supp. 3d 1, 10-11 (D.D.C. 2020). Immediately after Cissna's resignation, Deputy Director Mark Koumans became acting director pursuant to the Federal Vacancies Reform Act (FVRA), 5 U.S.C. § 3345(a)(1), which permits a "first assistant" to

[2] The form has been updated multiple times. *See* OMB, *OMB Control Number History*, OMB Control Number: 1615-0116, https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=1615-0116. The October 24, 2019 form was preceded by a March 2018 form and instructions (AR 157-178). *See* AR 407-449 (comparing proposal to March 2018 version).

automatically become the acting officer, if the President does not appoint someone else. *See L.M.-M*, 442 F. Supp. 3d at 10. Days later, however, USCIS hired Cuccinelli from outside of government into a new position, "Principal Deputy Director." On June 10, Acting Secretary Kevin McAleenan designated the new position to be the "first assistant," though both the designation and Cuccinelli's position would expire when the vacancy was filled. Cuccinelli thus became not just "Principal Deputy Director," but also "first assistant" and "Acting Director." *See id.* at 10-11.[3]

After Cuccinelli became Acting Director, USCIS moved forward with a proposal to change the fee-waiver standard. A few days before he arrived, on June 5, 2019, USCIS had published a Paperwork Reduction Act (PRA) notice stating that USCIS was still "in the process of responding to the comments received" earlier, 84 Fed. Reg. at 26,139, and allowing new comments until July 5, 2019, *id.* at 26,138. USCIS later summarized and responded to the comments, including those received through July 5. *See* AR 314-329, 397-406; Suppl. Smullin Decl. Ex. C; Dkt. 11 at 20 n.7. In September and October, USCIS completed drafts of the proposed new form and instructions and "tables of changes" showing the revisions. *See* AR 407-49, 463-83 (showing dates); Dkt. 24-2 at 3 (items 30, 31, 34, 35). On October 16, USCIS submitted its PRA request to OMB, AR 461, after uploading materials to OMB earlier in October, *see* Suppl. Smullin Decl. Ex. B at 2, C. Cuccinelli was still Acting Director, *see id.* at Ex. A at 2, on October 24, 2019, when USCIS

[3] Plaintiffs ask this Court to take judicial notice of the factual material in *L.M.-M*. This material includes the following documents from C.A. No. 19-2676-RDM (D.D.C.): Dkt. 12-6 (Monk Decl., including exhibits); Dkt. 17-2 (Johnson Decl., including exhibits); Dkt. 17-3 (Monroe Decl., including exhibits); Dkt. 17-4 (Blackwell Decl., including exhibits); Dkt. 22-1 (Plaintiffs' SUMF); Dkt. 26 (Response to Plaintiffs' SUMF); Dkt. 25 at 18 n.4; U.S. House of Representatives, Committee on the Judiciary, Letter to Acting Secretary McAleenan (June 18, 2019), available at https://tinyurl.com/s9xlzyy.

revised its form, Dkt. 11-2, and on October 25, when USCIS took the other actions, AR 484.

**III. Harm that the October 2019 fee-waiver actions will inflict on plaintiffs**

As NWIRP previously explained, the October 2019 fee-waiver actions will hamper its work, requiring it to spend more time helping particular clients and thus reducing the number of clients it can serve. To counteract the harm, NWIRP will increase the time it spends on individual cases, advance more clients' fees, and devote more time to training staff and modifying training and outreach materials. *See* Dkt. 11 at 26-28; Dkt. 27 at 13-24; Dkt. 11-1 (Barón Decl.); Dkt. 50-1 at 2-3, 12-15, 18, 19 (Second Barón Decl. ¶¶ 5-9, 29-36, 37, 43, 45) (providing additional details on clients' needs and training on IRS requirements, and updated information on NWIRP emergency funds); *see also Vote Forward v. DeJoy*, No. 20-2405 (EGS), 2020 WL 5763869, at *4-5 (D.D.C. Sept. 28, 2020) (finding standing on similar showing).

The October 2019 fee-waiver actions will also make it more difficult for Ayuda and CASA to provide services to immigrants and conflict with their missions, *see* Dkt. 50-2 at 1-2 (Ball Cooper Decl. ¶¶ 2-5) (describing provision of legal services to advance mission); Dkt. 50-3 at 2-3 (Escobar Decl. ¶¶ 3-8) (describing advancement of mission through naturalization program). The actions will require Ayuda and CASA to spend more time helping clients or members seek fee waivers than they would otherwise. They will have to reduce the number of individuals they serve. *See* Dkt. 50-2 at 3-5, 7-9 (Ball Cooper Decl. ¶¶ 7-13, 21); Second Ball Cooper Decl. at 1-7 (¶¶ 2-16); Dkt. 50-3 at 4-8, 9-10 (Escobar Decl. ¶¶ 14-25, 32); Second Escobar Decl. at 2-4 (¶¶ 4-9). To counteract the harm caused by USCIS's actions, they will also spend more time on training and related efforts. *See* Second Ball Cooper Decl. at 7 (¶ 17); Second Escobar Decl. at 4 (¶ 9).

The October 2019 fee-waiver actions will also cause Ayuda and CASA to lose revenue. *See* Second Ball Cooper Decl. at 7 (¶ 18); Second Escobar Decl. at 4 (¶ 9).

## IV. Overview of this litigation

NWIRP's summary judgment motion explained that USCIS's October 2019 fee-waiver actions are unlawful on multiple grounds. The 2019 Standard is a legislative rule that should have been adopted through notice-and-comment rulemaking. *See* Dkt. 11 at 29-34. USCIS also failed to observe PRA requirements. *See id.* at 48-51. Moreover, USCIS's October 2019 fee-waiver actions are arbitrary and capricious on multiple grounds. *See id.* at 34-47.

In response to USCIS's cross motion, NWIRP noted a question as to whether the October 2019 fee-waiver actions should be set aside because Cuccinelli's appointment as Acting Director violated the FVRA. *See* Dkt. 27 at 12 n.1. USCIS asserted that NWIRP could not raise an FVRA claim without amending its complaint, but also responded on the merits. *See* Dkt. 31 at 47-48.

Plaintiffs' Second Amended and Supplemental Complaint alleges new claims regarding the October 2019 fee-waiver actions. First, plaintiffs allege that the actions have no force or effect and are unlawful because they were adopted by Acting Director Cuccinelli, serving in violation of the FVRA. *See* Dkt. 45 at 71-73. Second, plaintiffs allege that the 2019 Standard violates the Immigration and Nationality Act (INA) and DHS's existing fee-waiver regulation by requiring inaccessible evidence. *See id*. at 68. This supplemental memorandum addresses those new claims.

## ARGUMENT

## I. Cuccinelli adopted the October 2019 fee-waiver actions in violation of the FVRA.

### A. Cuccinelli is responsible for the October 2019 fee-waiver actions.

Cuccinelli adopted the October 2019 fee-waiver actions pursuant to the USCIS Director's authority to "establish the policies for performing" the Director's functions and "establish national immigration services policies." 6 U.S.C. § 271(a)(3)(A), (D). The form changes were promulgated by USCIS. *See* 84 Fed. Reg. at 26,137. Cuccinelli's responsibility for the final actions is evident

in the Policy Alert from the "Office of the Director." AR 484. Further, the Director is the sole USCIS official with statutory policymaking authority, *see L.M.-M.*, 442 F. Supp. 3d at 30, the only type of USCIS authority arguably sufficient for the October 2019 fee-waiver actions.

In earlier briefing, USCIS defended the lawfulness of its fee-waiver actions under the FVRA only by disputing the relevant date. USCIS stated that the "only final agency action here" is "submission of the revised Form to OMB" and that such submission "occurred on June 5, 2019." Dkt. 31 at 48. That assertion is incorrect. Plaintiffs challenge several actions, none of which happened on June 5, 2019: the October 24, 2019 fee-waiver form and its instructions; the October 25, 2019 Policy Manual revision; the October 25, 2019 decision to retire the 2011 Memorandum; and the October 24, 2019 revision to USCIS's fee-waiver information-collection (reflected in the I-912 form and instructions). *See* Dkt. 11 at 17, 19, 20; Dkt. 11-3.[4] Although the Federal Register published a notice regarding USCIS's proposal on June 5, 2019, 84 Fed. Reg. at 26,137, USCIS did not submit its PRA request to OMB until October, long after Cuccinelli became Acting Director. *See* AR 461; Suppl. Smullin Decl. Exs. B at 2, C. Further, under the PRA, USCIS could not adopt the form revisions before OMB's October 24 approval, AR 461. *See* 5 C.F.R. § 1320.5(a), (g). Until then, USCIS could have withdrawn the request for OMB approval and, even after approval, USCIS could have chosen not to issue the revised form.

If anything, USCIS's suggestion that it nevertheless made up its mind by June 5, 2019,

[4] USCIS has never disputed that the fee-waiver form and instructions, the information-collection revision, and retirement of the 2011 Memorandum are final agency actions. USCIS argued that its Policy Manual revision is not a final agency action. *See* Dkt. 25-1 at 32-33. As NWIRP explained, however, the action is one "from which legal consequences will flow," Dkt. 27 at 27-29, and as evident from its official adoption, represents the consummation of the agency's decisionmaking process, *id.* at 27, which USCIS did not dispute in its motion, Dkt. 25-1 at 32-33.

underscores that its actions are unlawful. USCIS has pointed to its April and June notices as evidence of an adequate process. *See* Dkt. 25-1 at 35, 44-45. Plaintiffs do not agree that *any* USCIS notice cured its Administrative Procedure Act (APA) and PRA violations. *See* Dkt. 27 at 38, 50. But if USCIS made up its mind by June 5, that would mean its violations go even further, because the agency would have ignored comments it stated it reviewed, including April comments it was reviewing in June, 84 Fed. Reg. at 26,139. Receiving comments and then ignoring them would be a concern under the APA's reasoned decisionmaking requirement, *see* Dkt. 11 at 41-43, and under the PRA, *see id.* at 50, because USCIS's request to OMB included the representation (actual or implied) that USCIS responded to such comments, Suppl. Smullin Decl. Ex. C; Dkt. 11 at 20 n.7.

**B. Cuccinelli was unlawfully serving as Acting Director.**

Cuccinelli "was designated to serve as the acting Director of USCIS in violation of the FVRA." *L.M.-M.*, 442 F. Supp. 3d at 29. His designation was by virtue of McAleenan naming Cuccinelli's position as "first assistant." *See id.* at 10-11. But Cuccinelli could not become Acting Director in that way for all the reasons this Court earlier explained, including because he "never did and never [would] serve in a subordinate role—that is, as an 'assistant'—to any other USCIS official." *Id.* at 24; *see id.* at 24-30. Additionally, the FVRA's first-assistant provision only applies to a first assistant serving when a vacancy arises. *See* 5 U.S.C. § 3345(a)(1) (providing that "the" first assistant "shall" become acting when the vacancy arises). Cuccinelli's appointment is also unlawful because McAleenan had no authority to serve as Acting Secretary, and in that capacity, designate a first assistant. Defendants represented that McAleenan had authority pursuant to an April 10, 2019, order issued by then-Secretary Nielsen. *See* Dkt. 69 at 18. But for reasons that plaintiffs earlier explained, and incorporate by reference here, Nielsen did not make McAleenan the Acting Secretary. Dkt. 50 at 27-28; Dkt. 74 at 10-12.

**C. The October 2019 fee-waiver actions are void.**

Because Cuccinelli adopted the October 2019 fee-waiver actions while serving in violation of the FVRA, those actions "have no force or effect" under 5 U.S.C. § 3348(d)(1). This FVRA provision applies to an "action" taken by a person serving in violation of the FVRA "in the performance of any function or duty of [the] vacant office." *Id.* A "function or duty" is one "established by statute" and "required by statute to be performed by the applicable officer (and only that officer)." *Id.* § 3348(a)(2)(A). These requisites are satisfied here. Cuccinelli adopted the actions under 6 U.S.C. § 271(a)(3)(A) and (D), which, as this Court has concluded, are "functions and duties" of the Director under 5 U.S.C. § 3348(a)(2)(A). *See* 442 F. Supp. 3d at 30-34.

Because Cuccinelli had no authority to be Acting Director, the October 2019 fee-waiver actions are also "in excess of statutory … authority" and "not in accordance with law" and thus unlawful. 5 U.S.C. § 706(2). They are void ab initio under the FVRA, and even if not, they should be set aside. *See L.M.-M*, 442 F. Supp. 3d at 34-35. The prejudicial error doctrine is not a barrier to relief because the error in Cuccinelli's appointment was structural. The error was also prejudicial; "[t]he Court cannot be confident that the same [actions] would have been issued under" another acting Director. 442 F. Supp. 3d at 35 (cleaned up). The de facto officer doctrine does not apply here because the defect in Cuccinelli's appointment was "fundamental," not technical. *Nguyen v. United States*, 539 U.S. 69, 80 (2003) (holding doctrine does not apply to "fundamental" defect in judge's authority). Cuccinelli's appointment is "one which could never have been taken at all," *id.*, because as a new government employee who was not a first assistant and not Senate-confirmed, Cuccinelli could not have become Acting Director under *any* of the mechanisms permitted by the FVRA. *See* 5 U.S.C. § 3345(a). Additionally, this suit exhibits two characteristics the D.C. Circuit has deemed sufficient to allow "collateral" challenges to an official's authority,

even when the de facto officer doctrine applies. USCIS "had reasonable notice … of the claimed defect" in Cuccinelli's title, as it learned within days of the concern. 442 F. Supp. 3d. at 35. Further, NWIRP brought this action "at or about the time" of the challenged actions. *Id*. It sued within a week of their adoption, Dkt. 1, raised the issue of Cuccinelli's authority within several months, Dkt. 27 at 12 n.1, and after USCIS asserted an amendment was needed, Dkt. 31 at 48, proposed amendment at the first sensible opportunity, Dkt. 42. More generally, the doctrine's purposes are satisfied: There is no risk of "citizens' reliance on past government actions" or harm to "the government's ability to take effective and final action." *Andrade v. Lauer*, 729 F.2d 1475, 1500 (D.C. Cir. 1984). The lawsuit alerted the public to the uncertainty of the challenged actions, and they have been enjoined since December 2019. *See* Dkt. 85 at 5.

## II. The 2019 Standard violates the Immigration and Nationality Act and DHS regulation.

The 2019 Standard requires fee-waiver applicants to obtain IRS documents to establish income eligibility. With no exception in many circumstances, the rigid IRS-document requirement will restrict some immigrants from seeking fee waivers, for reasons that have nothing to do with USCIS fees or an immigrant's ability to pay them. The 2019 Standard thus violates the INA, 8 U.S.C. § 1255(*l*)(7), and DHS regulation, 8 C.F.R. § 103.7(c) (2020). *See* AR 3161, 3355-56.

### A. The 2019 Standard violates the Immigration and Nationality Act.

The INA, 8 U.S.C. § 1255(*l*)(7), requires that DHS "shall permit aliens to apply for a waiver of any fees associated with" certain forms filed by immigrants who are seeking or have received specified humanitarian benefits that provide legal protections to survivors of abuse, violence, and crime. The benefits include T and U nonimmigrant status, which provides lawful status for survivors of trafficking or other crimes, who help law enforcement. *See* 8 U.S.C. §§ 1101(a)(15)(T), (U), 1255(*l*), (m). The provision also applies to survivors of domestic abuse,

including VAWA (Violence Against Women Act) self-petitioners. *See* 8 U.S.C. § 1101(a)(51); *see also id.* §§ 1105(a), 1229b(b)(2) (other protections named in 1255(*l)*(7)); *see generally* Dkt. 11 at 13; Dkt. 21 at 13-16. Additionally, section 1255(*l*)(7) applies to Temporary Protected Status under 8 U.S.C. § 1254a(a)(3), which enables individuals to stay in the United States when "an ongoing armed conflict, environmental disaster, or other conditions prevent the safe return … to their countries of origin." *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1091 (N.D. Cal. 2018).

Section 1255*(l)*(7) is intended to facilitate immigrants' prompt application for humanitarian benefits. Fee waivers enable timely applications by eliminating a barrier—an unaffordable fee—that could delay or prevent an individual from seeking protection. Section 1255(*l*)(7) was added by section 201 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044, 5054. The section is named "Protecting Victims Against Retaliation," contained in a title called "Combating Trafficking in Persons in the United States," and under the subtitle of "Ensuring Availability of Possible Witnesses and Informants." 122 Stat. at 5052. Section 1255(*l)*(7) accomplishes the goals named in these titles by putting immigration status within reach. Without the ability to seek protections, "vulnerable immigrants" remain in the "shadow[s]," *Enriquez v. Barr*, 969 F.3d 1057, 1063 (9th Cir. 2020) (Murguia, J., concurring), and may longer suffer at the hands of abusers, be at risk of removal, or lack the ability to gain financial independence through employment. *See id.*; Dkt. 11 at 13-14; Dkt. 21 at 13-15. And T and U status are expressly tied to law enforcement efforts, designed to encourage witnesses to come forward. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, §§ 102, 107(e), 114 Stat. 1464, 1466, 1477-78 (creating T status and recognizing purpose to protect victims and aid law enforcement); *id.* at div. B, tit. V, § 1513, 114 Stat. at 1533-37 (similar, regarding U status).

Indeed, section 1255(*l*)(7) is part of a statutory scheme in which Congress has repeatedly made clear that benefits for survivors of abuse, violence, and crimes should not be delayed by stringent documentation requirements. For instance, Congress required DHS to accept "any credible evidence" in support of certain applications. *See, e.g.*, 8 U.S.C. §§ 1154(a)(1)(J) (VAWA self petitions), 1184(p)(4) (U status), 1186a(c)(4), 1229b(2)(D) (other victims of domestic abuse). The "any credible evidence" standard was created "to make it *easier* for battered women" to prove eligibility and "to bolster … the opportunities for battered women to obtain relief under immigration law," eliminating a burdensome, regulatory evidentiary standard. *Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1144-45 (9th Cir. 2005). Other parts of the 2000 law that created T and U status likewise reflected Congress's intent to "reduc[e] … evidentiary hurdles" on survivors of abuse. *Id.* at 1145 n.9 (discussing Pub. L. No. 106-386); *see generally* Dkt. 21 at 15-16.

Contrary to the language and purpose of section 1255(*l*)(7), the 2019 Standard undermines accessibility by restricting fee waivers to immigrants who are able to obtain IRS documents, for themselves and their household members, without allowing an alternative, in many circumstances. The 2019 Standard requires income-based applicants, as well as the members of an applicant's household, to submit IRS transcripts of their federal income taxes. Dkt. 11-2 at 19, 20. Those with no income must submit IRS documentation that "indicates no tax transcripts and no W-2s were found," *id.* (referring applicants to IRS Form 4506-T); this amounts to a "verification of non-filing letter" *plus* a "wage and income" transcript (both of which the IRS also calls "transcripts"). AR 2971-72; Suppl. Smullin Decl. Ex. D (IRS Form 4506-T). An applicant who cannot meet other requirements must still provide documents "indicat[ing] no tax transcripts and no W-2 were found." Dkt. 11-2 at 19. The 2019 Standard provides an exception for some individuals seeking humanitarian benefits, but that exception applies only if their lack of documents is due to their

"victimization." Dkt. 11-2 at 21. And though the 2019 Standard leaves some ambiguity as to whether hardship applicants must observe all the same income documentation requirements, hardship applications are not a substitute for income-based ones; they are subject to a different substantive standard and can involve extensive documentation of financial circumstances *other than* income. Further, USCIS expressly requires hardship applicants *without* income or proof of income to submit IRS documents "indicat[ing] no tax transcripts and no W-2s were found." *Id*.

Obtaining required IRS documents can involve significant logistical hurdles and delay. First, the IRS can take weeks or months to provide a single document (on top of the time required to prepare and submit the necessary requests). The IRS's online transcript-retrieval system is only available to individuals with certain loan accounts and cell phone accounts in their name, social security numbers (SSNs), and other requisites (including internet access). *See* AR 2549, 3254, Dkt. 11 at 23. The SSN requirement alone eliminates access to individuals who do not yet have lawful permanent residence or work authorization, as they generally do not qualify for a SSN. *See* 20 C.F.R. § 422.104(a).[5] To retrieve an IRS document by mail can require changing the address on file with the IRS. The IRS estimates it needs four to six weeks to process such a request after it is received; mailing a transcript alone can take the IRS ten days or more. *See* Dkt. 11 at 23; AR 2473, 2565, 2971, 3119, 3342, 3343; IRS, *Get Transcript FAQs* (Sept. 19, 2020), https://www.irs.gov/individuals/get-transcript-faqs (cited, in earlier version at AR 2473, 3343).[6]

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[5] NWIRP earlier mistakenly stated that the IRS offers transcripts online to individuals with ITINs. In fact, SSNs are required. *See* AR 2549, 3254; IRS, *Welcome to Get Transcript* (Sept. 23, 2020), https://www.irs.gov/individuals/get-transcript (cited in AR 2549, 3254 and Dkt. 11-2 at 20).

[6] USCIS directs immigrants to the IRS's website and form. Dkt. 11-2 at 20; *also* AR 247, 320. IRS offices, to the extent they offer transcripts, are not available to immigrants in detention

Second, the 2019 Standard requires applicants to obtain IRS documentation for each household member. This requires those individuals' cooperation and assistance, plus additional requests to the IRS, all of which can add to the hurdles and increase the time necessary to complete fee-waiver applications. *See* AR 2971, 3158, 3306, 3308; *see also* Suppl. Smullin Decl. Ex. D at 2 (regarding consent and paperwork required for someone to request a family member's tax transcript); IRS, *Welcome to Get Transcript* (Sept. 23, 2020), https://www.irs.gov/individuals/get-transcript (stating that online tools are for use only by taxpayer seeking own documents).

Third, to request IRS forms, including verification of non-filing or that no W-2s are on file, requires a SSN or individual taxpayer identification number (ITIN), and some applicants (or family members) will not have either. Suppl. Smullin Decl. Ex. D; AR 2235, 3341, 3344. Requesting an ITIN can involve numerous hurdles, plus more IRS processing time. *See* AR 3341-42.[7]

Fourth, language barriers, lack of digital access, limits on the availability of legal assistance, unstable living circumstances, and IRS restrictions on third-party representatives can complicate the tasks described above, further extending the time needed to obtain IRS documents. *See* AR 522, 2101, 2329, 2711-12, 3119-3121, 3160, 3307-08, 3339, 3342, 4318, 5092.

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or far from an office, or who face language, transportation, or identification barriers. *See* AR 1849-50, 1978, 2322, 2264, 2937, 3341-42; IRS, *IRS Operations During COVID-19: Mission-Critical Functions Continue* (Aug. 31, 2020), https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue (showing that transcripts not offered by offices now).

[7] USCIS has asserted that for someone without a SSN or ITIN, the IRS "will be able to document that a return was not filed." AR 320. This statement contradicts the record and, in any case, does not address the companion requirement for proof that "no W-2s were found." USCIS goes on to state that someone without a SSN/ITIN "may provide a W-2." AR 320. But the requirement for verification of non-filing (and no W-2s) is for applicants *without* income or other documents. Also, W-2s require SSNs (among other requisites). IRS, *2020 General Instructions for Forms W-2 and W-3*, at 7 (Mar. 17, 2020), https://www.irs.gov/pub/irs-pdf/iw2w3.pdf.

Combined, IRS processing times and other hurdles mean that IRS documentation requirements will lead applicants to delay or forfeit fee-waiver applications. And because a fee waiver request must be submitted with the underlying benefits application, the 2019 Standard will also force immigrants to delay or forfeit benefits (or choose between an unaffordable fee and necessities, *see* Dkt. 11 at 14, 23-25). *See* 8 C.F.R. § 103.7(c)(2) (2020); *see also* 85 Fed. Reg. 46,788, 46,916 (Aug. 3, 2020) (to be codified at 8 C.F.R. § 106.1(a)). The four to six weeks that the IRS requires to change an address alone can be longer than the 30 or 33 days that USCIS allows immigrants to seek administrative appeals, *see* 8 C.F.R. §§ 103.3(a)(2)(i), 103.8(b), 336.2(a). The time required to receive IRS documentation can put individuals at risk of missing other deadlines, and at the very least, delay their access to protections—leading to longer times without status, lapses in status or employment authorization, or a longer time in detention. *See* Dkt. 11 at 13-14, 24-25; AR 2013, 2841-2842, 2937, 3276, 3158, 3304-05, 3311, 3348-3349, 3355, 5250, 5253.

In this way, the 2019 Standard violates the INA. Although USCIS can adopt eligibility standards for fee waivers by rule, the 2019 Standard, which requires IRS documents, with no exception in many circumstances, restricts access to fee waivers for reasons unrelated to individuals' financial circumstances or need for a waiver. Section 1255(*l*)(7) does not permit such restrictions. *Cf. E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1272-77 (9th Cir. 2020) (holding a restriction on asylum eligibility unlawful on two alternative grounds, when it contradicts statutory language and is inconsistent with the protective purposes of asylum law).[8]

[8] No deference is due USCIS on this issue. The statutory meaning is plain, and, in any event, the agency has not purported to issue any interpretation of the statute, let alone one "carrying the force of law." *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006).

**B. The 2019 Standard violates the existing fee-waiver regulation.**

The 2019 Standard also violates 8 C.F.R. § 103.7(c) (2020).[9] The regulation states that individuals may seek fee waivers if they are "unable to pay" and the waiver "is consistent with the status or benefit sought," *id*. § 103.7(c)(1), requiring only a "written request" with "evidence," *id.* § 103.7(c)(2). Nothing in the rule's text suggests that the inability to provide one type of income "evidence" should put fee waivers out of reach for individuals who are "unable to pay" *and* able to provide *other* "evidence." *See* AR 3355-56. Indeed, DHS adopted its current fee-waiver regulation in 2010 with a focus on "ensur[ing] that fee waivers are applied in a fair and consistent manner" and provided based on "economic necessity," as well as to address "difficulty in navigating the fee waiver process." 75 Fed. Reg. 58,962, 58,973, 58,974 (Sept. 24, 2010). But the IRS-document requirement will delay or preclude fee-waiver applications, and do so for an arbitrary reason, unrelated to economic necessity. And USCIS suggested that it intended this effect, as it described the form-change as aimed to "curtail[]" fee waivers. 84 Fed. Reg. at 26,138. USCIS later asserted that the regulation "does not require USCIS to accept or require specific evidence," AR 315, but failed to reconcile the IRS-document requirements with the regulation.

**CONCLUSION**

For the foregoing reasons and those set forth in NWIRP's earlier memoranda in support of its summary judgment motion, this Court should grant plaintiffs' motion for partial summary judgment, declare the October 2019 fee-waiver actions unlawful and without force and effect, and set them aside.

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[9] This regulation will be amended by the 2020 Fee Rule, if that rule goes into effect.

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Respectfully submitted,

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