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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE CITY OF SEATTLE, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

Case No. 3:19-cv-07151-MMC

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Judge: Honorable Maxine M. Chesney
Hearing: December 9, 2019 at 9:00 a.m.

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INTRODUCTION

Fee waivers for immigration adjudication and naturalization services are not prescribed in any statutory provision. Rather, Congress has authorized the Department of Homeland Security (DHS) to set such fees at a level that will recover the costs of providing some services at no cost to some applicants. 8 U.S.C. § 1356(m). By regulation, DHS has provided, on a discretionary basis, fee waivers for certain services, subject to only two conditions: (1) the applicant is "unable to pay" the fee; and (2) a "waiver based on inability to pay is consistent with the status or benefit . . . ." 8 C.F.R. § 103.7(c)(1). DHS also requires that waiver requests be in writing and state the reasons for and provide evidence in support of the claim of "inability to pay." *Id.* at § 103.7(c)(2).

Prior to 2010, U.S. Citizenship and Immigration Services and its predecessor offices (USCIS) exercised this discretionary authority by accepting and holistically reviewing ad hoc written waiver requests. But in 2010, USCIS streamlined the fee waiver adjudication process, implementing a new form for submitting requests: the Form I-912 (Form). The Form instructions detailed three types of evidence of inability to pay that USCIS would accept: (1) evidence of receipt of a means-tested benefit; (2) evidence of household income at or below 150% of the Federal Poverty Guidelines (FPG); or (3) evidence of financial hardship. *See* Form I-912, Request for Fee Waiver Instructions (Sept. 24, 2010), AR36–42. The instructions also stated that USCIS would still accept ad hoc written requests. The implementation of the Form I-912 represented the first time USCIS accepted evidence of receipt of a means-tested benefit as per se evidence of inability to pay.

In the first six years that USCIS accepted evidence of receipt of a means-tested benefit to demonstrate inability to pay, the estimated annual revenue forgone due to fee waivers and exemptions more than tripled. This was especially concerning for two reasons: (1) to compensate for the forgone revenue, the agency would have to raise other fees, and (2) because, since 1988, fees have served as the primary funding source for USCIS. While a number of factors may have contributed to the increase, UCSIS determined that it must stem the tide. Thus, in 2018, USCIS, in its discretion, undertook to revise the Form I-912 and its instructions to curtail the rising costs of fee waivers, reduce disparate treatment of similarly situated requestors, ameliorate concerns about the integrity of the fee waiver program, and improve quality and consistency of fee waiver adjudications. The revisions include: (1) eliminating acceptance of evidence of receipt of a means-tested benefit as per se evidence of inability to pay; (2) requiring applicants to submit an Internal Revenue Service (IRS) tax transcript as evidence of income; and (3) requiring applicants to use the Form I-912 rather than another written format.

Notwithstanding that the statute and regulations afford USCIS significant discretion over fee waivers, and that USCIS stated the reasonable basis for the Form revisions it implemented, Plaintiffs—five organizations that provide legal and other services to immigrants, and a non-California city that runs naturalization assistance programs—nevertheless seek emergency nationwide injunctive relief against the Form revisions. Plaintiffs, who do not include or represent a single applicant for immigration adjudication and naturalization services or for a fee waiver, cannot meet basic jurisdictional requirements, and their claims, in any event, are meritless. As a threshold matter, Plaintiffs cannot demonstrate harm at all, much less irreparable harm; to the contrary, the only effect felt by Plaintiffs from USCIS's action is the continued obligation to do their job of assisting immigrants navigate the ever-evolving immigration and naturalization process. Their claims under the Administrative Procedure Act (APA) fail because USCIS's revision of Form I-912 was procedurally proper, reasonable, and consistent with the regulation it implements. And their claims under the Federal Vacancies Reform Act (FVRA) and the Appointments Clause of the U.S. Constitution must be rejected because they have not identified an agency action taken by the (validly serving) USCIS Acting Director. Although Plaintiffs disagree with the manner in which USCIS exercised its discretion, they provide no basis for the extraordinary relief they seek. Accordingly, Plaintiffs' motion should be denied.

BACKGROUND

I. Statutory and Regulatory Background

The Immigration Examinations Fee Account (IEFA) is the primary funding source of USCIS, a DHS component agency charged with receiving and processing (adjudicating) requests for lawful immigration to the United States. *See* Pub. L. No. 100-459, sec. 209, 102 Stat. 2186 (1988) (codified as amended in the Immigration and Nationality Act (INA) § 286(m)–(n), 8 U.S.C. § 1356(m)-(n)) (hereinafter "USCIS fee statute"). Fees for providing immigration adjudication and naturalization services are deposited into the IEFA and used to fund the provision of all such services, including services provided to asylees and immigrants at no charge. *See* Pub. L. No. 101-515, sec. 210(d)(1) and (2), 104 Stat. 2101 (1990).

The USCIS fee statute does not specifically mention fee waivers. *See* 8 U.S.C. § 1356(m). However, the statute directs that "fees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants. Such fees may also be set at a level that

will recover any additional costs associated with the administration of the fees collected." *Id.* DHS has interpreted that provision to authorize the agency to provide, on a discretionary basis, certain services for free in the form of total fee exemptions, or fee waivers, subject to certain conditions or criteria.[1] As explained in the regulations promulgated under this authority, the fee waivers may be available where:

(i) The party requesting the benefit is unable to pay the prescribed fee.
(ii) A waiver based on inability to pay is consistent with the status or benefit sought.

8 C.F.R. § 103.7(c)(1). To request a fee waiver, the "person requesting an immigration benefit must submit a written request for permission to have their" fee waived. *Id.* § 103.7(c)(2). This written request "must state the person's belief that he or she is entitled to or deserving of the benefit requested, the reasons for his or her inability to pay, and evidence to support the reasons indicated." *Id.* The regulation lists the benefit applications for which a fee waiver is available. *Id.* § 103.7(c)(3).[2]

USCIS previously allowed fee waiver applicants to submit requests in a variety of ways and undertook a holistic analysis of the applicant's finances to determine inability to pay. *See* Agency Information Collection Activities; Revision of a Currently Approved Collection: Request for Fee Waiver; Exemptions, 84 Fed. Reg. 26,137 (June 5, 2019), AR330 (Second 30-Day Notice). In 2010, during the rulemaking concerning the current fee waiver regulations, *see* USCIS Fee Schedule, 75 Fed. Reg. 58,962, 58,989 (Sept. 24, 2010) (2010 Final Rule), AR2, 29, DHS noted that commenters had cited difficulty in navigating the fee waiver process. USCIS agreed that the fee waiver process would benefit from standardization and, accordingly, separately proposed a new information collection request pursuant to the Paperwork Reduction Act, 44 U.S.C. §§ 3501, *et seq.* (PRA), to facilitate the fee waiver process. *See* Form I-912, Request for an Individual Fee Waiver, 75 Fed. Reg. 40,846 (July 14, 2010); AR14. As DHS explained in the 2010 Final Rule, the Form I-912 would outline the documentation necessary to support a request for a fee waiver. AR30. As the original Form I-912, Request for Fee Waiver (Sept. 24, 2010), AR32–33, stated, USCIS would generally waive fees for applicants who:

(1) Were receiving a means-tested benefit;

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[1] The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) requires DHS to permit certain applicants to apply for fee waivers for "any fees associated with filing an application for relief through final adjudication of the adjustment of status." *See* title II, subtitle A, sec. 201(d)(3), Pub. L. No. 110-457, 122 Stat. 5044 (2008); INA § 245(l)(7), 8 U.S.C. § 1255(l)(7).

[2] 8 C.F.R. § 103.7(d) authorizes the USCIS director to approve and suspend exemptions from fees or provide that the fee may be waived for a case or class of cases that is not otherwise provided in 8 C.F.R. § 103.7(c).

(2) Had a household income at or below 150% of the Federal Poverty Guidelines (FPG); or
(3) Were experiencing financial hardship due to extraordinary expenses or other circumstances that rendered the individual unable to pay the fee such as unexpected medical bills or emergencies.

AR32–33; AR36–42; *see also* USCIS Fee Waiver Memo (Mar. 13, 2011), AR43–50.

In 2016, after USCIS conducted a comprehensive fee review, DHS adjusted certain immigration and naturalization benefit fees. USCIS Fee Schedule, 81 Fed. Reg. 73,292 (Oct. 24, 2016) (2016 Final Rule), AR89. The fee review demonstrated that current USCIS fees do not recover the full costs of the services USCIS provides, and DHS determined that increasing fees and adding a new fee were necessary "to fully recover costs [for USCIS services] and [to] maintain adequate service." AR90. In the fee adjustment rulemaking, DHS noted that nearly half of the increase was necessary to account for reduced revenue stemming from an increase in fee waivers granted since FY 2010. USCIS Fee Schedule, 81 Fed. Reg. 26,904, 26,910 (May 4, 2016) (2016 Proposed Rule), AR52, 58. As DHS explained in the final rulemaking, "the cost of providing services with a discount or without a fee must be transferred to those who pay a full fee" and, therefore, "USCIS takes a relatively careful position with respect to transferring costs from one applicant to another through the expansion of fee waiver eligibility." AR104. DHS also signaled that it "may in the future revisit the USCIS fee waiver guidance with respect to what constitutes inability to pay under 8 CFR 103.7(c)." AR70.

II. The 2019 Revisions to the Form I-912 and Instructions.

In 2018, USCIS undertook revisions to the Form itself: (1) USCIS revised the criteria it would consider in evaluating inability to pay; (2) USCIS required Federal income tax transcripts to demonstrate income; and (3) USCIS required use of the Form I-912 for fee waiver requests. Second 30-Day Notice, AR330-33. First, since implementation of the 2011 policy guidance, USCIS had found that various income levels used in states to grant a means-tested benefit resulted in different eligibility determinations for applicants with the same income. Therefore, to reduce disparate treatment of similarly situated requestors, ameliorate the concerns about the fee waiver program, and improve quality and consistency of fee waiver adjudications, USCIS decided to eliminate means-tested benefit receipt as per se evidence of inability to pay. *Id.* Second, USCIS frequently rejected applications with incomplete copies of tax returns or copies that were not signed or filed with the IRS to support fee waiver requests. *See* USCIS Responses to Public Comments on Form I-912 received during 60-Day comment period, AR 242–49. In light of these documentary issues, USCIS determined that reliance on tax transcripts could reduce the number of rejected forms. Finally, USCIS determined that permitting ad

hoc requests increased the burden on USCIS adjudicators. Accordingly, USCIS decided to require submission of the Form I-912 for all fee waiver requests to support uniformity of the fee waiver process and reduce that burden. *Id.*; Form I-912, Request for Fee Waiver, Supporting Statement for 2019 Revision, AR452.

On September 28, 2018, USCIS published a 60-day notice in the *Federal Register* requesting comments on the revised Form I-912 and instructions and posted the documents for review in docket USCIS–2010–0008 at www.regulations.gov. Agency Information Collection Activities; Revision of a Currently Approved Collection: Request for Fee Waiver; Exemptions, 83 Fed. Reg. 49,120 (Sept. 28, 2018) (60-Day Notice), AR179. USCIS received 1,198 comments on the 60-Day Notice. USCIS responded to the public comments and made changes to the Form and instructions based on the comments. *See* AR242-49. On April 5, 2019, USCIS published a second notice in the *Federal Register* informing the public that USCIS will be submitting the revised Form I-912 to the Office of Management and Budget (OMB) for review and clearance in accordance with the PRA, and providing an additional 30 days for public comments. Agency Information Collection Activities; Revision of a Currently Approved Collection: Request for Fee Waiver, 84 Fed. Reg. 13,687 (Apr. 5, 2019) (First 30-Day Notice), AR250. USCIS received 1,240 comments on the First 30-Day Notice. USCIS responded to the public comments and made changes to the form and instructions based on the comments. *See* AR314-29. On June 5, 2019, USCIS published a third notice in the Federal Register to notify the public that it had submitted the revised Form I-912 to the OMB, and invite additional public comments for 30-days. AR330. USCIS received 617 comments after publishing that notice. USCIS did not make changes to the form and instructions based on public comments received on the June 5, 2019 notice, but responded to the public comments in its submission to OMB. *See* AR397-406. The Office of Information and Regulatory Affairs, OMB approved the form changes on October 24, 2019.[3] On October 25, 2019, USCIS published the revised Form I-912 and instructions, along with corresponding revisions to the USCIS Policy Manual and a Policy Alert. *See* AR484-514. The revised Form and Manual take effect on December 2, 2019.[4]

III. This Litigation

Plaintiffs challenge the 2019 revisions to the Form I-912, the Policy Alert and the Policy Manual

[3] The approved package is available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201910-1615-006# (last visited Nov. 19, 2019).

[4] On November 14, 2019, DHS published a Notice of Proposed Rulemaking announcing the agency's intention to, *inter alia*, amend the USCIS fee waiver regulations. *See* Notice, ECF No. 47.

(collectively, the "revisions"). In their Amended Complaint, ECF No. 24 (FAC), Plaintiffs bring claims under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (APA); the Federal Vacancies Reform Act, 5 U.S.C. § 3345 (FVRA); and the Appointments Clause, art. II, Sec. 2, cl. 2, of the U.S. Constitution. Plaintiffs seek a nationwide preliminary injunction. Pls.' Mot. for Preliminary Inj. & Mem. of P.&A., ECF No. 25 (Pls.' Mot.).

ARGUMENT

A preliminary injunction is "an extraordinary and drastic remedy" that should not be granted "unless the movant, *by a clear showing*, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)); *see Munaf v. Geren*, 553 U.S. 674, 690 (2008) (likelihood of success requires far more than identifying "serious, substantial, difficult, and doubtful" questions, including as to jurisdiction). Plaintiffs fail to meet any of these requirements.

I. Plaintiffs Are Unlikely to Succeed on the Merits.

A. Plaintiffs Lack Article III Standing to Bring Their Claims.

A plaintiff bears the burden of establishing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "To seek injunctive relief, a plaintiff must show that [it] is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Conclusory allegations are insufficient to establish the "concrete and particularized" and "actual or imminent" injury required for standing under Article III, even at the pleading stage. *Carrico v. City & Cty. of S.F.*, 656 F.3d 1002, 1005 (9th Cir. 2011). And the standing inquiry is especially rigorous where "plaintiffs' asserted injury arises from the government's allegedly unlawful regulation . . . of *someone else*." *Defs. of Wildlife*, 504 U.S. at 562.

1. *Plaintiffs Lack Organizational Standing Because They Have Not Shown A Diversion Of Resources Outside Their Normal Activities Or A Frustration Of Their Mission.*

Plaintiffs presumably assert standing as organizations in their own right, *i.e.*, organizational standing. Accordingly, they must satisfy the same test used to assess "standing in the context of an individual plaintiff."

La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest, 624 F.3d 1083, 1088 (9th Cir. 2010). To satisfy this requirement an organization must show it has "suffered 'both a diversion of its resources and a frustration of its mission.'" *Id.* (quoting *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding the alleged injury must be "more than simply a setback to the organization's abstract social interests"); *see generally Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1224–27 (9th Cir. 2012) (Ikuta, J., concurring and dissenting) (assessing tension between the Circuit's recent organizational standing doctrine and Supreme Court precedent).

Plaintiffs have not alleged sufficient facts to show either (a) diversion of resources or (b) frustration of mission. Instead, their "mere 'interest in a problem,'" is not sufficient to confer standing. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). "[T]hat interest, unaccompanied by a showing that the application of [the revisions] ha[s] somehow personally and actually harmed [Plaintiffs], cannot alone constitute the injury-in-fact" required for standing. *Schmier v. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 823 (9th Cir. 2002).[5]

a. Plaintiffs' diversion-of-resources allegations relate only to expenditures on activities within their normal realm of activities, which cannot constitute an injury in fact.

To establish the first organizational standing requirement, a plaintiff must have been "injured by a necessity to divert resources from its normal activities to activities *outside* of its normal realm." *La Asociacion De Trabajadores De Lake Forest v. City of Lake Forest*, 2008 WL 11411732, at *6 (C.D. Cal. Aug. 18, 2008) (emphasis added), *aff'd*, 624 F.3d 1083 (9th Cir. 2010); *see also Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 285-86 (3d Cir. 2014) (holding that "additional expenditures … consistent with [an organization's] typical activities" do not confer standing). In other words, "[a]n organization cannot convert its ordinary program costs into an injury in fact." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995).

First, although Plaintiffs have been on notice of the revisions for over a year (and most submitted comments), only OneAmerica alleges it has already diverted *any* resources. Pls.' Mot. 20 (stating OneAmerica has diverted "120 hours of staff time and over $3,000" to adapt). Moreover, those costs are entirely consistent with OneAmerica's normal activities. *E.g.*, Decl. of Rich Stolz ¶¶ 36–37, ECF No. 25-8 (explaining

[5] Plaintiffs do not appear to assert associational standing. Nor could they, because to establish associational (also known as representational) standing, a plaintiff "must demonstrate that at least one of its members would otherwise have standing to sue in [the member's] own right," among other requirements. *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 917-18 (9th Cir. 2018) (quoting *Wash. Envtl. Council v. Bellan*, 732 F.3d 1131, 1139 (9th Cir. 2013)). Plaintiffs cite no specific individual at all, let alone one of their members.

OneAmerica's diverted resources went to "educating volunteers and DOJ-Accredited Representatives … about the changes and how to help applicants apply for a fee waiver," which the organization already does). Nothing about this lone alleged diversion lies outside of OneAmerica's "normal realm." *Lake Forest*, 624 F.3d at 1088 (stating an organization "cannot manufacture the injury by … simply choosing to spend money").

The remaining Plaintiffs, who merely allege they will have to divert resources sometime in the future, fare no better. First, standing for injunctive relief requires an injury that is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). With over a year of lead-time, the fact that only one Plaintiff alleges it has already diverted any resources to prepare for the revisions is telling. Second, the revised Form requires no diversion of resources outside of Plaintiffs' "ordinary program costs," if it requires any diversion at all. *Nat'l Taxpayers Union*, 68 F.3d at 1434; *see generally* Pls.' Mot. 20 n.20 (citing declarations showing Plaintiffs' anticipated costs are of the sort they already undertake to assist immigrants apply for naturalization). Indeed, some of Plaintiffs' volunteers and staff already use the unrevised Form (as opposed to ad hoc submissions) and help or instruct applicants how to complete income- or hardship-based fee waiver requests, *see* FAC ¶¶ 204–06, 208 (explaining that not all clients apply for fee waivers based on receipt of means-tested benefits and some Plaintiffs already offer help with income- or hardship-based fee waivers at their workshops), meaning the revisions require no diversion of resources "from [their] normal activities." *Lake Forest*, 2008 WL 11411732, at *6.[6]

b. Plaintiffs' frustration-of-mission allegations are speculative and rely on the decisions of independent third parties, which cannot form a basis for standing.

To establish the second requirement, a plaintiff must show a frustration of its mission. *Lake Forest*, 624 F.3d at 1088. Based on their similar organizational missions (providing assistance to immigrants applying for naturalization, *see* FAC ¶¶ 23–28, 198), Plaintiffs advance two theories about how this mission may be frustrated: that the revised Form will (1) require Plaintiffs to spend more time and resources on a given applicant, making it more difficult for them to achieve beneficial outcomes, and (2) reduce Plaintiffs' market

[6] Plaintiffs' bluster that their primary service-delivery model will become untenable, Pls.' Mot. 9–11, does not confer standing either. Many applicants already finish and submit applications *after* attending a workshop. *See, e.g.*, FAC ¶ 204 (explaining that many applications are not ready to mail at the end of a workshop and will be completed with follow-up). Thus, the revised Form does not obsolete Plaintiffs' business model as a factual matter. Nor would such a change—if it were believed—necessarily amount to a diversion of resources outside their "normal realm" of providing assistance to immigrants applying for naturalization through direct legal services. *Lake Forest*, 2008 WL 11411732, at *6.

of potential clients. Neither theory presents a cognizable frustration of mission because both boil down to speculation about possible future injury based on the decisions of independent actors. *See Amnesty Int'l*, 568 U.S. at 414. The relevant analysis is whether the revised Form interferes with the Plaintiffs' ability to carry out their normal activities. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013). If anything, under Plaintiffs' own theories, the revised Form makes their services *more* valuable to those they serve.

First, while those Plaintiffs that directly serve clients may desire that their staff spend more time on some applicants because of the revised Form, nothing about the revisions requires they do so. Plaintiffs' own varied estimates of the additional time required, from fifty percent, FAC ¶ 219, to "ten times more," Pls.' Mot. 20, expose just how speculative this theory is. What is more, there are several steps Plaintiffs can (and do) use to reduce the time spent on an applicant: refer particularly complex cases to one-on-one services, FAC ¶ 209; inform prospective clients of the required form and proof before workshops; and provide clients who do not already have the requisite proof with instructions for obtaining it. And again, Plaintiffs already serve clients who use the unrevised Form, use income- and hardship-based fee waiver applications, or do not need a fee waiver at all. At bottom, it is their *desire* to see more applications completed and sent the day of their own workshops (to get credit for funding) that underlies their frustration-of-purpose claim.

Second, Plaintiffs have not alleged sufficient facts to show beneficial outcomes will be less likely for their clients. Their conclusory allegations that requests will "likely" face "a lower rate of success" do not establish standing. FAC ¶ 220; *see Amnesty Int'l*, 568 U.S. at 409. Indeed, they cite no facts suggesting requests using Form I-912 or income- or hardship-based fee waivers succeed at a lower rate. To the contrary, one of USCIS's reasons for the revisions was to reduce the number of rejected applications. *See, e.g.*, AR 321.

Third, Plaintiffs' allegation that the revised Form will shrink the market for their free legal services—either because of fewer qualified fee waiver applicants or because of a chilling effect on qualified applicants, FAC ¶¶ 221–22, Pls.' Mot. 6–7, 11—does not satisfy the frustration-of-mission requirement. Plaintiffs cite no existing or prospective client at all, making this theory entirely speculative (relying on the decisions of unidentified third parties) and therefore not "certainly impending." For Plaintiffs to suffer an injury, a material number of clients must not only be affected by the revised Form, but must then choose to forgo Plaintiffs' services entirely. And any subjective chilling effect on Plaintiffs' potential clients is not an Article III injury: "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm

or a threat of specific future harm." *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1129 (9th Cir. 1996) (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)). Thus, Plaintiffs' allegations that fewer applicants will begin or complete the naturalization application process, are unavailing for organizational standing.

Again, all Plaintiffs seek to assist immigrants applying for naturalization; the revised Form does not frustrate that mission. Plaintiffs' may now prefer a narrower reading of that mission—effectively arguing entitlement to holding a particular type of workshop or to ensuring a particular application timeline for their own independent funding purposes—but affecting that preference does not amount to an Article III injury.

2. ***Plaintiffs' Loss-Of-Funding Allegations Do Not Support Standing Because They Are Not Traceable To Defendants.***

In some circumstances, an organization may establish standing by alleging a loss of funding resulting from the challenged action. *E.g.*, *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1236 (9th Cir. 2018). Plaintiffs' allegations fail to do so. This is because Plaintiffs' funding model depends on their contractual arrangements with third parties (in addition to the independent decisions of prospective clients to use their services). Where allegations of harm arise from the independent decisions of third parties, "it is 'substantially more difficult' for a plaintiff to establish standing when the plaintiff 'is not himself the object of the government action … he challenges.'" *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 653–54 (9th Cir. 2017) (quoting *Defs. of Wildlife*, 504 U.S. at 562); *see Amnesty Int'l*, 568 U.S. at 414 (noting that courts are "usual[ly] reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors").

Defendants have no influence over Plaintiffs' contractual funding arrangements. The third parties that do, like Washington State's Department of Commerce or the City of San Francisco, Pls.' Mot. 8, will "exercise their judgment" and discretion in light of the Form revisions in ways that: (1) "require guesswork" by the Court, (2) Plaintiffs may undertake to influence themselves, and (3) may obviate Plaintiffs' concerns altogether. *Missouri ex rel. Koster*, 847 F.3d at 654 (quoting *Amnesty Int'l*, 568 U.S. at 413). Indeed, Plaintiffs may well still meet their funding targets through their own industry. Nothing about the Form revisions requires Plaintiffs to submit fewer completed applications, the metric that determines the funding they allege the revised Form threatens. Nor does the revised Form reduce anyone's eligibility for naturalization. The revisions simply require using a Form and type of proof already available to and used by Plaintiffs' clients to request fee waivers. Thus, the revised Form is *not* "the very last step in the chain of causation" for Plaintiffs'

loss-of-funding allegations and does not provide a basis for standing. *Bennett v. Spear*, 520 U.S. 154, 169 (1997). Instead, Plaintiffs effectively ask the Court to assume: they will be unable to do work they already do to meet funding targets; the federal government is responsible for hypothetical consequences of Plaintiffs' independent contractual arrangements; and the third parties on those contracts will be unconvinced to reevaluate the funding targets if, as Plaintiffs allege, the revisions work such a significant change.

Plaintiffs have identified no case finding standing on comparable facts. The cases they do cite for irreparable harm (and presumably standing), Pls.' Mot. 18–21, are distinguishable. *See, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1241–43, *as amended by* 932 F.3d 742 (9th Cir. 2018) (finding organizational standing where the challenged action, *inter alia*, allegedly directly rendered almost all of the organizations' clients ineligible for the benefit the organizations helped them seek and required organizations to "convert" part of their legal practice to an entirely new posture and); *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1120–21 (N.D. Cal. 2019) (finding standing where defendants acknowledged organizational standing given ruling in *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018), *appeal filed*, No. 18-17436 (9th Cir. Dec. 26, 2018), and the challenged action physically relocated the organizations' clients outside of the United States, impeding their mission of directly assisting them); *E. Bay Sanctuary Covenant*, 354 F. Supp. 3d at 1116 (finding standing where the challenged action, *inter alia*, allegedly directly rendered 80% of organizations' client base categorically ineligible for the benefit the organizations helped them seek, while many remaining eligible clients were physically relocated hundreds of miles from the organizations' places of business); *Doe v. Trump*, 288 F. Supp. 3d 1045, 1066–67 (W.D. Wash. 2017) (finding standing where, *inter alia*, the challenged action allegedly rendered almost all of the organizations' clients ineligible for the benefit the organizations helped them seek and numerous individual plaintiffs also gave rise to third-party standing), *remanded*, 2018 WL 1774089 (9th Cir. Mar. 29, 2018); *see also State v. Azar*, 385 F. Supp. 3d 960, 978–81 (N.D. Cal. 2019) (addressing direct barriers to organizations' ability to deliver "effective care" to patients and increased barriers to organizations' *federal* funding); *S.A. v. Trump*, 2019 WL 990680 (N.D. Cal. Mar. 1, 2019) (addressing need to divert resources to find entirely new legal alternatives after federal rescission of a benefit); *Open Communities All. v. Carson*, 286 F. Supp. 3d 148, 177 (D.D.C. 2017) (addressing need to divert resources

from planned projects to entirely new ones).[7]

B. Plaintiffs Are Outside the Zone of Interests Regulated by the Underlying Regulation.

Even if Plaintiffs could establish standing, their claims would still fail because they are outside the zone of interests served by the fee statue, 8 U.S.C. § 1356(m), and fee waiver regulation, 8 C.F.R. § 103.7(c)(3). The "zone-of-interests" requirement constrains plaintiffs who "invoke [a] cause of action" to enforce a statutory provision or its limits. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-30 (2014). Under the APA, a plaintiff falls outside the zone when its "interests are … marginally related to or inconsistent with the purposes implicit in the statute," *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 399 (1987), *even if* it "might technically be injured in an Article III sense." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011).

Plaintiffs fall outside the zone of interests served by the relevant statute and regulation. This case concerns a process by which individual applicants for naturalization can request a fee waiver. It is those applicants, not organizations that provide them with legal advice, who "fall within the zone of interests protected" by any limitations implicit in § 1356(m) or § 103.7(c)(3), because they are the "reasonable—indeed, predictable—challengers" to fee waiver decisions. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 227 (2012). Plaintiffs' purported economic interests (in the number of applications they complete in a given funding year) are not even "marginally related" to those of an applicant seeking a fee

[7] Although the FAC alleges harm to Seattle in the form of lost tax revenues, FAC ¶¶ 228–31, Plaintiffs do not rely on that alleged harm to support their Motion and, accordingly, have waived any such arguments. In any event, Seattle lacks standing because the general "impairment of state tax revenues" does not confer standing in a suit against the federal government because of "the unavoidable economic repercussions of virtually all federal policies." *Wyoming v. Dep't of Interior*, 674 F.3d 1220, 1234 (10th Cir. 2012) (quoting *Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976); *Arias v. DynCorp*, 752 F.3d 1011, 1015 (D.C. Cir. 2014) ("Lost tax revenue is generally not cognizable as an injury-in-fact for purposes of standing."). Instead, courts typically find localities have standing based on lost tax revenue only when the chain of causation is not too long or "spindly." *Navajo Nation v. Dep't. of the Interior*, 876 F.3d 1144, 1163 (9th Cir. 2017); *see, e.g.*, *City of Oakland v. Lynch*, 798 F.3d 1159, 1164 (9th Cir. 2015) (finding the federal government's closure of a marijuana dispensary that paid city taxes constituted an Article III injury).

Seattle's allegations that the revised Form will cause it to lose GDP growth and, in turn, tax revenue, are too speculative to form a basis for standing. Citing only "data provided" by another Plaintiff, Plaintiffs only allege specific losses to Washington *state* tax revenue, not Seattle's. FAC ¶ 229. They cite no Seattle resident or study of Seattle residents. They therefore ask the Court to assume that there are residents of Seattle who: receive means-tested benefits and exceed 150% of FPG; nonetheless fail to qualify for a hardship-based fee waiver; would decide not to naturalize based on failure to qualify for the fee waiver; would remain in Seattle; and would contribute to the city's tax revenue and do so at a lower rate than they would have if they had naturalized. The Court should decline the invitation down this "lengthy causal chain." *City & Cty. of S.F. v. Whitaker*, 357 F. Supp. 3d 931, 951 (N.D. Cal. 2018).

Nor may Seattle argue it is suing *on behalf of* residents allegedly affected by the revised Form. *See Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848 (9th Cir. 1985) (no *parens patriae* standing for localities).

waiver to apply for naturalization. *Cf. INS v. Legalization Assistance Project of L.A. Cty. Fed'n of Labor.*, 510 U.S. 1301, 1302, 1304-05 (1993) (O'Connor, J., in chambers) (concluding that relevant INA provisions were "clearly meant to protect the interests of undocumented aliens, not the interests of organizations [that provide legal help to immigrants]," and that the fact that a "regulation may affect the way an organization allocates its resources … does not give standing to an entity which is not within the zone of interests the statute meant to protect"); *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 899 (D.C. Cir. 1996) (dismissing under zone-of-interests test where plaintiffs relied on incidental effects of challenged policy on their staff).

C. Plaintiffs' Substantive Claims Lack Merit.

Even if Plaintiffs could establish standing, their claims are meritless. Plaintiffs raise three APA claims, arguing that USCIS's revision of Form I-912 was (1) procedurally improper, (2) arbitrary and capricious, and (3) contrary to law because it was enacted by an allegedly illegally serving USCIS Director. Plaintiffs also raise two claims asserting that the USCIS Acting Director's service violates the FVRA and the Appointments Clause. But USCIS followed proper procedures to effect reasonable Form revisions consistent with 8 C.F.R. § 103.7(c)(2), and Mr. Cuccinelli's service as USCIS Acting Director complies with the FVRA and thus poses no Appointments Clause concern. Plaintiffs accordingly fail to establish the requisite likelihood of success.

1. USCIS's revision of Form I-912 was procedurally proper.

Plaintiffs argue that USCIS did not comply with the APA's notice-and-comment procedures, 5 U.S.C. § 553, when making the revisions, but these procedures do not apply to the agency's action. Under the APA, agencies must follow specific notice-and-comment procedures before adopting "legislative" or "substantive" rules. *Lincoln v. Vigil*, 508 U.S. 182, 196 (1993); *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003). Where this requirement applies, an agency must notify the public of proposed rules, *see* 5 U.S.C. § 553(b), and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments …." *Id.* § 553(c). But these revisions are not legislative or substantive, and USCIS complied with applicable procedures in revising the Form, including by providing ample notice of and opportunity to comment on those revisions pursuant to the PRA.[8]

[8] The target of Plaintiffs' challenge, in their parlance, is the "2019 Rule," collectively referring to the revised Form I-912, the Policy Alert entitled "Fees for Submission of Benefit Requests," issued by USCIS on October 25, 2019, and the contemporaneous publication of a revised section of the USCIS Policy Manual regarding

a. The Form revisions do not constitute a "substantive rule" under the APA.

The Form I-912 is an information-collection device governed by the PRA. Plaintiffs disagree, contending that USCIS violated the APA by failing to put the Form revisions through notice and comment. Plaintiffs are wrong. The APA requires notice-and-comment procedures for substantive rules, *Lincoln*, 508 U.S. at 196, but "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" are explicitly exempt from this requirement. 5 U.S.C. § 553(b)(3)(A). Because the agency's action falls under this exemption, notice-and-comment rulemaking was not required.

1. In the APA's terms, the Form revisions are best understood as "procedural rules." The Ninth Circuit defines "rules of agency organization, procedure, or practice," *id.* § 553(b)(3)(A)—referred to in the caselaw as "procedural rules," *see Erringer v. Thompson*, 371 F.3d 625, 633 n.15 (9th Cir. 2004)—as rules that "extend[] to technical regulation of the form of agency action and proceedings." *S. Cal. Edison Co. v. FERC*, 770 F.2d 779, 783 (9th Cir. 1985) (*SCEC*). "[C]hanges in the timing, requirements or manner in which an application … is made are generally considered procedural changes." *United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 728 F. Supp. 2d 1077, 1084 (N.D. Cal. 2010) (*Gonzales & Gonzales*). Moreover, a

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fee waivers for immigration benefit requests. *See* FAC ¶¶ 84-85. However, neither the Policy Alert nor Policy Manual revisions constitute reviewable final agency action under the APA. *See Bennett*, 520 U.S. at 177–78. Courts "focus on both the 'practical and legal effects of the agency action,' and define the finality requirement 'in a pragmatic and flexible manner.'" *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1163 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2621 (2019) (quoting *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006)); *see also Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th Cir. 2014); *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (Roberts, J.) (concluding agency document that merely "*restat*[*ed*] EPA's established interpretation of the … regulation, … tread no new ground" and "left the world just as it found it … cannot be fairly described as implementing, interpreting, or prescribing law or policy" and thus "is not reviewable agency action"). Here, the agency action that effected a change to waiver requests was revising the Form I-912 and its instructions; and the Policy Alert and Policy Manual revisions merely restate the requirements for fee waiver requests that are already prescribed in the Form and instructions. Had the Policy Alert and Policy Manual revisions not issued, waiver applicants would still have to comply with the requirements of the revised Form I-912 (mandating use of the Form, eliminating acceptance of receipt of a means-tested benefit as evidence of inability to pay, and requiring submission of tax transcripts) as of December 2, 2019. Thus, the Policy Alert and Policy Manual revisions are not "action[s] … by which 'rights or obligations have been determined', or from which 'legal consequences will flow,'" *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)), and have no "practical [or] legal effects," *Havasupai Tribe*, 906 F.3d at 1163. Accordingly, the Policy Alert and Policy Manual revisions are not "final agency action" and the Court lacks jurisdiction to entertain Plaintiffs' challenge to them. *See Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 266 (9th Cir. 1990) ("'[F]inal agency action' is a jurisdictional requirement imposed by [5 U.S.C. § 704]."). This Court additionally lacks jurisdiction over Plaintiffs' challenges to the Policy Alert and Policy Manual revisions because, for similar reasons, they are not redressable. But even if the Policy Alert and Policy Manual revisions were reviewable, they would be procedurally proper because neither constitutes a substantive rule for the reasons explained in this section, and they are not arbitrary and capricious for the reasons explained in Section I.C.2., *infra*.

procedural rule is exempt from the APA's notice-and-comment requirements, even if it has "substantive impact" on parties before an agency. *SCEC*, 770 F.2d at 782-83; *see also James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000) (even an "especially burdensome" procedural rule is exempt from notice-and-comment). A rule that merely changes "the manner in which the parties present themselves or their viewpoints to the agency," like the revised Form, "does not alter the underlying rights or interests of the parties," and is properly considered a procedural rule. *Gonzalez & Gonzalez*, 728 F. Supp. 2d at 1084.

The revisions are procedural, and notice and comment were not required to effect them. When USCIS first created the I-912, it did so pursuant to the same procedure used here: an "information collection request for review and clearance in accordance with the Paperwork Reduction Act." 75 Fed. Reg. at 40,846; *see also* AR14. As USCIS stated then, it aimed to "standardize" the "fee waiver process," and issued the "new form [I-912] to facilitate the fee waiver process" by "clearly outlin[ing] the requirements and documentation necessary to support a request for a fee waiver." *Id.* Similarly, the revised Form "clearly outline[s] the requirements and documentation necessary to support a request for a fee waiver," *id.*: the revised Form articulates "new guidance on the documentation acceptable for individuals to present to demonstrate that they are unable to pay a fee when requesting a fee waiver," AR180; *see also* 84 Fed. Reg. at 26,138 ("USCIS is removing the means-tested benefit as a criterion in its fee waiver request determinations, requiring the submission of Form I–912 to request a fee waiver, and clarifying what [evidence] will be considered for a fee waiver."). In articulating new guidance regarding both acceptable evidence to demonstrate "inability to pay" under 8 C.F.R. § 103.7(c)(3) and the form the written request must take, the revised Form simply effectuates technical changes to fee waiver applications, bringing it squarely within the Ninth Circuit's definition of a procedural rule. See *S. Cal. Edison Co.*, 770 F.2d at 783; *Gonzales & Gonzales*, 728 F. Supp. 2d at 1084.

Centrally, the standards for granting fee waivers remain unchanged. As before, a "[d]iscretionary waiver of … fees" may be granted only if "[t]he party requesting the benefit is unable to pay," and "[a] waiver based on inability to pay is consistent with the status or benefit sought." 8 C.F.R. § 103.7(c)(1). An action that does not "change the *substantive standards* by which [USCIS] evaluates [fee waiver requests] … fall[s] comfortably within the realm of the 'procedural.'" *JEM Broad. Co. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994); *see also Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1055 (D.C. Cir. 1987) (if "standard of review" is unchanged, "focus and timing of review are matters for agency discretion, … well within § 553's procedural exemption.").

2. Even if the revisions are not procedural, they are still exempt from notice-and-comment rulemaking because they do not constitute substantive rules but are, at most, "interpretive." The Ninth Circuit has distinguished substantive rules, which "create rights, impose obligations, or effect a change in existing law," from interpretive rules, which "merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule." *Hemp Indus.*, 333 F.3d at 1087; *see also Mora-Meraz v. Thomas*, 601 F.3d 933, 940 (9th Cir. 2010) ("[A]gencies issue interpretive rules to clarify or explain existing law or regulations so as to advise the public of the agency's construction of the rules it administers." (citation omitted)). Courts have explained that Congress's purpose "in imposing notice and comment requirements … —to get public input so as to get the wisest rules"—"is not served" when an agency is merely setting forth "what the law already is." *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 680 (6th Cir. 2005) (explaining that, in such cases, the agency is determining "not 'what is the wisest rule,' but 'what is the rule'").

The Ninth Circuit's decision in *Mora-Meraz* is instructive. There, an unwritten Bureau of Prisons (BOP) policy required inmates seeking to enter a residential drug abuse program to confirm that the inmate used the same substance for which the inmate was seeking treatment within twelve months prior to incarceration. *Mora-Meraz*, 601 F.3d at 937. The Court deemed the 12-month requirement to be interpretive because it "flow[ed] directly from" a requirement already set forth in a BOP manual, which itself supplied a definition for a requirement set forth in a BOP regulation. *Id.* at 940. Closely analogous, here, 8 C.F.R. § 103.7(c)(2) sets forth the requirements to "submit a *written request* for permission to have their request processed without payment of a fee," including "*evidence* to support the reasons [for the applicant's inability to pay]" (emphasis added), and the challenged revisions—requiring submission of the Form I-912 as the "written request" to obtain a fee waiver, and eliminating the receipt of a means-tested benefit as "evidence" of "inability to pay"—simply clarify these requirements. *See* 84 Fed. Reg. at 26,138 (explaining regulatory requirements); *see also id.* at 26,139 (explaining that the Form revisions are "based on 8 CFR § 103.7(c)" and "did not change the substantive standards" but rather "just the procedural steps for such requests"). Like the BOP procedures in *Mora-Meraz*, the Form revisions here are, at most, interpretive. 601 F.3d at 940.

Nor is any of the three circumstances identified by the Ninth Circuit as indicating a rule is legislative rather than interpretive present here. As the Court explained in *Hemp Industries*, a rule is legislative when (1) "in the absence of the rule, there would not be an adequate legislative basis for [the agency's] action";

(2) "the agency has explicitly invoked its general legislative authority"; or (3) "the rule effectively amends a prior legislative rule." 333 F.3d at 1087. None of these conditions applies here.

First, 8 C.F.R. § 103.7(c)(2) provides an adequate "legislative" basis for fee waiver decisions by setting forth the applicable standard and basic procedure. Second, USCIS did not invoke its general legislative authority when revising Form I-912. Rather, USCIS invoked *existing* statutory and regulatory authority to assess and waive fees. *See* AR180 (regulatory authority); AR250 (statutory and regulatory authority); 84 Fed. Reg. at 26,139 (noting lack of changes to existing standards for fees and fee waivers). Third, the revisions do not amend a prior legislative rule; they leave the regulatory *standard* for considering discretionary fee waivers unchanged. *See Erringer*, 371 F.3d at 632 ("[A] rule is considered legislative under the 'amends a prior legislative rule' test 'only if it is inconsistent with another rule *having the force of law*.'" (emphasis added) (quoting *Hemp Indus.*, 333 F.3d at 1088)). Indeed, the 2010 creation of the Form I-912 was itself an interpretive rule and was issued pursuant to the PRA.[9] The pending 2019 revisions are no less—indeed, are more—interpretive.

For all of these reasons, the Form revisions cannot be considered a substantive rule and are exempt from notice-and-comment rulemaking.

b. The Form revision is governed by the Paperwork Reduction Act.

The applicability of the PRA is clear. The PRA was enacted to reduce the burden of paperwork requests on the public, 44 U.S.C. § 3501(1), and governs "collection[s] of information," defined as "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format." *Id.* § 3502(3)(A). Form I-912 meets this definition, as made clear in the notice proposing the Form's creation. 75 Fed. Reg. at 40,846.

The PRA imposes procedural requirements for information-collection devices distinct from the APA's rulemaking requirements. For a proposed information-collection form, the PRA requires two notice-and-comment periods. 44 U.S.C. §§ 3506, 3507. First, the agency must publish a Federal Register notice and allow 60 days for comment. *Id.* § 3506(c)(2)(A). After considering the comments, the agency submits its information-collection request to the OMB Director for review. *Id.* § 3507(c)(3). OMB, with certain

[9] *See, e.g.*, 75 Fed. Reg. at 40,846 (providing notice that USCIS would be submitting an "information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995" for new Form I-912); AR14 (explaining that 8 CFR §103.7(c) governs "the fee waiver process" and that then-new Form I-912 "outline[s] the requirements and documentation necessary to support a [fee waiver] request").

exceptions, then reviews the proposed collection concurrent with an additional 30-day comment period, and, if warranted, approves the proposed information collection for a period up to three years. *Id.* §§ 3507, 3508.

USCIS complied with the PRA in revising the Form I-912—*see* AR179 (publication of proposed revision to Form I-912 and invitation to comment on proposed revisions during 60-day period); 84 Fed. Reg. at 26,138 (notice advising that USCIS had submitted the revised Form I-912 as an "information collection request to [OMB] for review and clearance in accordance with the [PRA] … [and] inviting additional public comments for 30-days")—and Plaintiffs present no allegation or argument that it did not. Accordingly, USCIS's revisions to the Form were procedurally proper in accordance with the PRA.

2. *The revised Form is not arbitrary and capricious.*

Even if the Court were to find that the Form revisions fall under the APA, Plaintiffs are unlikely to succeed on their claim that the revisions are arbitrary and capricious.

Plaintiffs assert four arguments that the Form revisions are "arbitrary [and] capricious" under 5 U.S.C. § 706(2)(A). Arbitrary and capricious review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010). "A reasonable basis exists where the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008). A decision will be set aside only if the agency "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 945 (9th Cir. 2010). A court may not "infer an agency's reasoning from mere silence," but "[e]ven when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned." *Crickon v. Thomas*, 579 F.3d 978, 982 (9th Cir. 2009). USCIS's actions satisfy this standard here.

First, Plaintiffs argue that USCIS's elimination of means-tested benefits receipt as evidence of inability to pay is arbitrary and capricious because the agency did not "'cogently explain why [it] exercised [its] discretion in a given manner.'" Pls.' Mot. 14 (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983)). USCIS stated two reasons for the Form revisions: (1) absent the revisions, USCIS

would "continue to forgo increasing amounts of revenue as more fees are waived" which would in turn require the agency "to increase the fees that it charges for benefit requests for which fees are not waived," AR331; and (2) "USCIS has found that the various income levels used in states to grant a means-tested benefit result in inconsistent income levels being used to determine eligibility for a fee waiver," and the agency was seeking "to introduce more consistent criteria for approving all fee waivers," AR332. And USCIS elaborated on each reason. As to the first, as USCIS reported in the June 5, 2019 notice, "the estimated annual forgone revenue from fee waivers and exemptions has increased markedly," and the revisions are intended "to curtail[] the rising costs of fee waivers." *Id.* And as to the second, USCIS explained that accepting receipt of a means-tested benefit as evidence of inability to pay yielded a situation in which "a fee waiver may be granted for one person who has a certain level of income in one state, but denied for a person with that same income who lives in another state." *Id.* These explanations offer more than "mere silence;" rather, they represent the agency's "articulat[ion of] a rational connection between the facts found and the choices made," *Arrington*, 516 F.3d at 1112 (citations omitted), and allow "the agency's path [to] reasonably be discerned," *Crickon*, 579 F.3d at 982 (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004)).

Moreover, "a court is not to substitute its judgment for that of the agency," "especially … when the agency is called upon to weigh the costs and benefits of alternative policies." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) (quotations and citations omitted). Courts must be deferential when reviewing the agency's choice, and review is limited to deciding whether DHS's "decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment," *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1342 (D.C. Cir. 1985). Plaintiffs fail to identify a sufficient basis to overcome this deference.

Second, Plaintiffs argue that USCIS did not "explain" why the 150% FPG income threshold is a "fair measure of an applicant's inability to pay." However, any challenge to the reasonableness of using the 150% FPB income threshold for demonstrating inability to pay is time-barred. Where, as here, no other statute provides a limitations period, a plaintiff has six years to bring a civil action against the United States. 28 U.S.C. § 2401. The 150% FPG income threshold has been in place since at least November 2010, when the Form I-912 first took effect. *See* AR32–42. To the extent Plaintiffs challenge USCIS's *exclusive* reliance on this income threshold for demonstrating inability to pay rather than providing fee waiver applicants with the *choice* of demonstrating receipt of a means-tested benefit *or* demonstrating income at or below 150% FPG, Plaintiffs'

challenge collapses into their argument that eliminating receipt of a means-tested benefit as evidence of inability to pay is arbitrary and capricious, which fails for the reasons explained *supra*.

Third, Plaintiffs challenge USCIS's "fail[ure] to take into account factors such as cost of living," arguing that "[b]ecause the FPG does not account for differences in the cost of living, it does not effectively measure an individual applicant's ability to pay." Pls.' Mot. 15. While they do not dispute USCIS's finding that "the various income levels used in states to grant a means-tested benefit result in inconsistent income levels being used to determine eligibility for a fee waiver," Plaintiffs simply posit that USCIS's choice to rely exclusively on the 150% FPG income threshold produces its own inconsistency. *Id.* at 5. Plaintiffs' quarrel with USCIS's choice between two (perhaps imperfect) options is not sufficient to overcome the deference due to USCIS's decision. *See* AR323. As noted *supra* p.19, courts are to be especially deferential to agencies' weighing of and choices between alternate policies. *Consumer Elecs. Ass'n,* 347 F.3d at 303; *see also Ctr. for Auto Safety*, 751 F.2d at 1342. Further, Plaintiffs offer no reason why the United States, when determining eligibility for a discretionary federal benefit, must rely on programs administered by and at the discretion of the 50 states. Finally, that an agency may rely on an income threshold tied to the FPG in determining eligibility for a benefit is eminently reasonable; in fact, that is a primary purpose of the FPG. *See, e.g.*, Annual Updates of the HHS Poverty Guidelines, 84 Fed. Reg. 1167, 1168 (Feb. 1, 2019) (explaining that the FPG are "a simplified version of the poverty thresholds that the Census Bureau uses to prepare its estimates of the number of individuals and families in poverty" and "are used as an eligibility criterion by Medicaid and a number of other Federal programs").[10] Plaintiffs' disagreement with USCIS's choice is not a basis for "substitut[ing their] judgment for that of the agency." *Consumer Elecs. Ass'n,* 347 F.3d at 303 (quoting *State Farm*, 463 U.S. at 43).

Finally, Plaintiffs argue that USCIS "failed to provide a reasonable basis for its decision to reject tax returns as proof of income." Pls.' Mot. 16. However, USCIS did state reasons for tax requiring transcripts:

[10] 42 U.S.C. § 9902(2)) requires the Secretary of the Department of Health and Human Services (HHS) to update the FPG annually to account for the prior calendar year's increase in prices as measured by the Consumer Price Index, and HHS publishes notice of the annual update in the Federal Register. The FPG, or percentage multiples of the FPG, are incorporated into eligibility criterion for more than 30 federal programs. *See* Office of the Assistant Sec'y of Planning & Evaluation, HHS, *Frequently Asked Questions Related to the Poverty Guidelines and Poverty: What Programs Use the Poverty Guidelines*, *https://aspe.hhs.gov/frequently-asked-questions-related-poverty-guidelines-and-poverty* (last accessed Nov. 19, 2019). For example, by statute, USCIS must utilize the FPG when determining the sufficiency of an Affidavit of Support Under Section 213A of the INA submitted on behalf of certain intending immigrants. 8 U.S.C. § 1183a(a)(1)(A).

> USCIS cannot accept incomplete copies of tax returns or copies that are not signed or submitted to the IRS to support fee waiver requests, because such a lax standard would encourage fraud in the fee waiver process. Therefore, USCIS believes that requiring transcripts will reduce the number of fee waiver request rejections. USCIS believes the change will reduce the number of fee waiver requests that are rejected because of improper documentation ….

AR321; *see also* AR403. "Reduc[ing] the number of fee waiver request rejections," *id.*, is particularly significant because pursuant to 8 C.F.R. § 103.7(c)(2), "[t]here is no appeal of the denial of a fee waiver request." These explanations offer more than "mere silence," "articulate[] a rational connection between the facts found and the choices made," *Arrington*, 516 F.3d at 1112 (quotation omitted), and allow "the agency's path [to] reasonably be discerned," *Crickon*, 579 F.3d at 982 (quotation omitted). Moreover, Plaintiffs do not substantively dispute USCIS's choice, wholly resting their argument on their (incorrect) assertion that the agency "failed to provide a reasonable basis for its decision." *Compare* Pls.' Mot. 16, *with* FAC Exs. G–I. Plaintiffs fail to identify a sufficient basis to overcome the deference due USCIS. *See Sacora*, 628 F.3d at 1068.

3. *The revised Form is consistent with 8 C.F.R. § 103.7(c).*

Plaintiffs' argument that the revised Form conflicts with § 103.7(c) ignores that section's plain language. According to Plaintiffs, "the text of … § 103.7(c)(2) … allows an applicant broad *discretion* in how to demonstrate their inability to pay." Pls.' Mot. 16 (emphasis added). However, while the regulation affords discretion in the fee waiver process, that discretion is explicitly and wholly vested in the *agency* in its adjudication of fee waiver requests; not only does the regulation make no reference to vesting any discretion in the *applicant*, but it imposes specific requirements for requests. *Compare* 8 C.F.R. § 103.7(c)(1) (imposing only two limits on USCIS's "[*d*]*iscretionary* waiver of fees" (emphasis added)), *with id.* § 103.7(c)(2) ("To request a fee waiver, a person requesting an immigration benefit *must* submit a written request for permission to have their request processed without payment of a fee with their benefit request. The request *must* state . . . the reasons for his or her inability to pay, and evidence to support the reasons indicated." (emphasis added)). While § 103.7(c)(2) is silent as to the form of the "written request" and supporting "evidence," that does not mean that the agency is obligated to accept any form of "written request." Nor does developing or requiring the use of Form I-912 somehow become "contrary to the regulation." To the contrary, because the regulation makes plain that the agency's authority to waive fees is discretionary, and because the regulation does not inhibit the agency's ability to determine what form "written request[s]" may take—as the agency has repeatedly done since 2010—the Form revisions are wholly consistent with its language and intention.

4. *Cuccinelli's service as Acting Director has no bearing on the validity of the Form revisions and, in any event, does not violate the FVRA or the Appointments Clause.*

Plaintiffs claim that Mr. Cuccinelli's service as Acting Director violates both the FVRA and the Appointments Clause, rendering the "2019 Rule" void. The FVRA permits certain individuals "to perform acting service in a vacant" office requiring Senate confirmation. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 936 (2017). The FVRA provides that, in general, "[a]n action taken by any person who is not" properly serving in an acting capacity under the statute "in the performance of any function or duty of a vacant office … shall have no force or effect." 5 U.S.C. § 3348(d)(1). The FVRA defines "action" to include "the whole or a part of an agency rule." *Id.* § 551(13); *see also id.* § 3348(a)(1) (defining "action" by reference to 5 U.S.C. § 551(13)).

Here, these principles have no application to the "2019 Rule." As to the revision of the Form I-912, that action was not "taken by" Mr. Cuccinelli. The revised Form was "submitted [as an] information collection request to [OMB] for review and clearance in accordance with the [PRA]" on June 5, 2019, 84 Fed. Reg. at 26,138, before Mr. Cuccinelli served in any position within USCIS.[11] Although the Form revisions were not approved until October 24, 2019, that approval was, under the PRA, the responsibility of OMB. After the revised Form was submitted to OMB on June 5, 2019, USCIS had no further substantive role to play in effecting the Form revisions. Thus, the validity of Mr. Cuccinelli's role as USCIS Acting Director has no bearing on whether the Form revisions have "force or effect" under the FVRA.[12] As to the Policy Alert and Policy Manual revisions, Mr. Cuccinelli did serve as Acting Director on October 25, 2019 when USCIS announced they would take effect on December 2, 2019. However, the Alert and the Manual revisions are not "actions" under the FVRA because they are not final agency actions. *See* 5 U.S.C. § 3348(a)(1) (defining "action" by reference to APA's list of reviewable final agency actions); *supra* n.8.

Moreover, to be voided under the FVRA, the "action" must be taken "in the performance of any function or duty" of the relevant office. 5 U.S.C. § 3348(d)(1). The FVRA defines "function or duty" as one "*required*" by statute or regulation "to be performed by the applicable officer (*and only that officer*)." *Id.*

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[11] The Federal Register notice announcing the submission of the information-collection request to OMB was signed by L. Francis Cissna. However, because Mr. Cissna had already resigned as Director by June 4, 2019, the submission must be attributed to Mark Koumans, who served as Acting Director from June 2-10, 2019.

[12] Defendants disagree that Cuccinelli's service was in violation of the FVRA because, *inter alia*, (1) 5 U.S.C. § 3345(a)(1) contains no express requirement that the first assistant be in place at the time the vacancy arises, in contrast to the express tenure requirement contained in § 3345(a)(3), and (2) Plaintiff's reading of § 3345(a)(1) conflicts both with the plain text of § 3345(a)(1) and with the provisions of § 3345(b)(1). But since this issue does not implicate the validity of the Form revisions, the Court need not address it.

§ 3348(a)(2) (emphasis added). Publishing an alert or revising a manual, both of which merely restate a previous agency action, is not reserved exclusively for the USCIS Director—nor do Plaintiffs allege they are.

Because Plaintiffs' Appointments Clause claim wholly depends on a finding that Cuccinelli's service violates the FVRA, Pls.' Mot. 18, Plaintiffs' failure to identify an agency action that violates the FVRA is fatal to that claim, too. Moreover, the Appointments Clause permits a non-Senate confirmed person to temporarily perform the duties of even a vacant *principal office*. *See United States v. Eaton*, 169 U.S. 331, 343 (1898).

II. Plaintiffs Fail to Establish Irreparable Harm.

"[P]laintiffs may not obtain a preliminary injunction unless they can show that irreparable harm is likely to result in the absence of the injunction." *All. for The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (*AFWR*). To establish a likelihood of irreparable harm, plaintiffs "must do more than merely allege imminent harm sufficient to establish standing; [they] must *demonstrate* immediate threatened injury." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (citation omitted).

For many of the same reasons that Plaintiffs lack standing, they also fail to reach the higher threshold for irreparable harm. Instead of a "persuasive counterfactual analysis showing a likelihood that irreparable harm would occur absent an injunction, but would not occur if an injunction is granted," *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 925–26 (N.D. Cal.), *appeal filed*, No. 19-16102 (9th Cir. May 29, 2019), Plaintiffs' irreparable harm allegations boil down to a combination of conclusory statements and speculation. *See* Pls.' Mot. 18–22. As discussed *supra*, Plaintiffs have not shown they face an imminent loss of funding, a substantially reduced market of clients, a drastically increased burden necessary to help each given client, or a necessary diversion of resources or additional costs outside their normal activities *resulting from* the revised Form. Instead, all of these alleged harms depend on the decisions of independent third parties. Moreover, each of these alleged harms is economic, which courts do not normally consider irreparable. *See L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). Indeed, if the revisions work such a significant change, why has only one Plaintiff—and not the Plaintiff alleging the revised Form poses an existential threat[13]—allegedly spent any resources to adapt in the year they've known about the revisions?

III. The Remaining Equitable Factors Require Denial of Plaintiffs' Motion.

Even if Plaintiffs had made a sufficient showing on both likelihood of success on the merits and

[13] This Plaintiff, Self-Help, did not comment on the proposed Form revisions at any time.

likelihood of irreparable injury, and they have not, they must make a satisfactory showing both that the balance of equities tips in their favor and that the public interest favors injunction. *AFWR*, 632 F.3d at 1135. These two factors merge when the federal government is a party, *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014), but Plaintiffs have not made a sufficient showing to meet the standard for either factor.

Plaintiffs cite a single out-of-Circuit district court case for the proposition that "[i]n the naturalization context, courts have previously found government practices that 'have frustrated the attempts of naturalization applicants and [service providers] to comply with these regulations' to 'weigh in favor of preliminary injunctive relief[,] and by' … 'merely … preserving the *status quo*,' the government 'will suffer little or no harm.'" Pls.' Mot. 22 (quoting *Campos v. INS*, 70 F. Supp. 2d 1296, 1310 (S.D. Fla. 1998). Even as non-binding authority, *Campos* is neither persuasive nor apposite. Most significantly, "preserving the *status quo*" in *Campos* equated with the agency simply delaying citizenship interviews until the court had ruled on the merits (an option Plaintiffs seem to have eschewed); by contrast, here, "preserving the *status quo*" would require the government to continue to forgo requiring evidence that is most likely to identify applicants in need of a fee waiver and thereby impose costs on other applicants. *Compare also Campos*, 70 F. Supp. 2d at 1310 ("service providers" were plaintiffs' physicians whose own evaluations of plaintiffs' health were indispensable to the plaintiffs' applications for medical waivers, which requiring certification by a licensed medical professional) *with* FAC ¶ 198 (alleging that Plaintiffs' assistance to applicants is "often required," but not actually legally necessary); *see also* 70 F. Supp. 2d at 1310 (complained-of agency action that allegedly "frustrated the attempts of naturalization applicants" was that the agency allegedly was "not following [its] own regulations").

For this reason, Plaintiffs' argument that USCIS "will suffer no harm from a preliminary injunction," Pls.' Mot. 22, fails to hold water. While fee-paying applicants are intended to cover the costs of waived applicants, since 2010, fee waivers have resulted in more than a three-fold increase in forgone revenues, and USCIS's recent notice of proposed rulemaking, *see* ECF No. 47, demonstrates that the current fees are not sufficient to cover the costs of USCIS operations, including the costs of processing applications for which the fee was waived. On the other hand, as explained *supra* Part II, Plaintiffs have not demonstrated any irreparable harm, or indeed any costs outside their normal activities, that will result from the revised Form. Accordingly, the balance of equities and public interest weighs in the Government's favor.

IV. The Court Should Not Grant a Nationwide Injunction.

Were the Court to order a preliminary injunction here, it should be limited to redressing only any established injuries to Plaintiffs. *See Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) ("The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."). Equitable principles require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Accordingly, the Ninth Circuit has repeatedly vacated or stayed the nationwide scope of injunctions, including in a challenge to a federal immigration rule. *See, e.g.*, *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (*EBSC*) ("[A]ll injunctions—even ones involving national policies—must be 'narrowly tailored to remedy the specific harm shown.'"); *see also California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) (collecting cases).

Plaintiffs' arguments for nationwide relief must be rejected. First, although they assert that absent relief for "all other naturalization service providers … Plaintiffs will become the only choice of naturalization aid for many applicants … significantly burden[ing] Plaintiffs['] operations," Pls.' Mot. 23, this argument is at odds with their allegation that the revised Form threatens to reduce the number of applicants they serve; it is not the Court's job to so finely tune relief such that Plaintiffs serve precisely the number of clients they desire. And as the Ninth Circuit found in *EBSC*, "granting a more limited injunction.… allows other litigants wishing to challenge the Rule to do so[, and i]ndeed, several already have." 934 F.3d at 1029; *see also Azar*, 911 F.3d at 583. So, too, here. *See Project Citizenship, Inc. v. DHS*, 1:19-cv-12362 (D. Mass. filed Nov. 15, 2019). As to Plaintiffs' argument that nationwide relief is appropriate simply because they challenge a rule of nationwide applicability, Pls.' Mot. 23, the Ninth Circuit recently rejected that view because it "ignores our well-established rule that injunctive relief must be tailored to remedy the specific harm alleged." *EBSC*, 934 F.3d at 1029 (quotation omitted). Finally, Plaintiffs argue that "disparate treatment" would ensue absent nationwide relief. Pls.' Mot. 23. But they identify no fee waiver applicant who fears the impact of the Form revisions on his own prospective waiver request. Based on their allegations, any "disparate treatment" would necessarily be of organizations providing immigration assistance services, but Plaintiffs have not alleged that all such entities nationwide share their mission, means, or funding model. Nationwide relief is, accordingly, not warranted.

CONCLUSION

For reasons stated herein, the Court should deny preliminary relief.

Dated: November 20, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2019, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ Julie Straus Harris
JULIE STRAUS HARRIS