MAYER BROWN LLP
Lauren R. Goldman (N.Y. Bar No. 2952422)
Matthew D. Ingber (N.Y. Bar No. 2964666)
Niketa K. Patel (N.Y. Bar No. 5314380)
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 506-2500
Facsimile: (212) 849-5973
lgoldman@mayerbrown.com
mingber@mayerbrown.com
npatel@mayerbrown.com

Attorneys for Plaintiffs
(Additional counsel listed on signature page)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE CITY OF SEATTLE, IMMIGRANT LEGAL RESOURCE CENTER, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., SELF-HELP FOR THE ELDERLY, ONEAMERICA, AND CENTRAL AMERICAN RESOURCE CENTER OF CALIFORNIA.

Plaintiffs,

vs.

DEPARTMENT OF HOMELAND SECURITY, CHAD WOLF, KENNETH CUCCINELLI, AND UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants.

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

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

Hearing Date: December 9, 2019
Hearing Time: 9 a.m.

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INTRODUCTION

The United States is "a nation of immigrants," *Foley v. Connelie*, 435 U.S. 291, 294 (1978), and for more than two centuries, Congress has provided a path by which immigrants become citizens: naturalization. Plaintiffs assist eligible low-income lawful permanent residents ("LPRs") to take advantage of that opportunity. Recognizing that application costs can be an insurmountable barrier to naturalization for low-income LPRs, USCIS has historically provided for waivers of the naturalization fee. But Defendants' recent changes to the fee waiver process will upend access to naturalization for LPRs. Although Defendants characterize these changes as merely technical, that characterization is belied by their significance, and the serious impact that they will have on Plaintiffs and those they serve. Indeed, the government admits that the 2019 Rule will drastically reduce the number of fee waiver applications, and that this is its purpose. As a consequence, it will destroy Plaintiffs' service model, frustrate their missions, force them to divert resources, and threaten their funding (and, indeed, their very existence).

The 2019 Rule is unlawful. As a threshold matter, it was issued under the authority of an illegally acting agency head and is void as a result. It also violates the APA's procedural and substantive requirements. Defendants' response ignores or mischaracterizes the relevant authorities and largely fails to address Plaintiffs' documentation of the immediate and irreparable harms that Plaintiffs will suffer absent a nationwide injunction enjoining the 2019 Rule—harms that are precisely the type of imminent injury that courts have regularly held to be sufficient for both Article III standing and a preliminary injunction. For the reasons set forth below, Plaintiffs are entitled to immediate relief.

ARGUMENT

I. PLAINTIFFS HAVE STANDING.

"To demonstrate Article III standing, a plaintiff must show a 'concrete and particularized' injury that is 'fairly traceable' to the defendant's conduct and 'that is likely to be redressed by a favorable judicial decision.'" *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 763 (9th Cir. 2018) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).[1] At best, the 2019 Rule will make it much more difficult for the Plaintiffs to serve their clients, compel them to completely change how they deliver services, and require

[1] At this "preliminary stage of the litigation," Plaintiffs' standing can rest on "allegations in their [c]omplaint and whatever other evidence they submitted in support of their [] motion." *Washington v. Trump*, 847 F.3d 1151, 1159 & n.3 (9th Cir. 2017).

the expenditure of additional resources to meet their clients' needs. At worst, it will threaten their programs' very existence. Defendants are wrong to contend that Plaintiffs fail to establish standing; they have shown both injury and traceability.

A. Plaintiffs Will Suffer "Concrete and Particularized" Injury Due To The 2019 Rule.

Organizations can demonstrate injury by showing (1) that the challenged policy "frustrates the organization's goals [i.e., mission] and requires the organization 'to expend resources in representing clients they otherwise would spend in other ways,'"; or (2) by demonstrating that the policy "will cause them to lose a substantial amount of funding," for which "a loss of even a small amount" is sufficient. *E. Bay Sanctuary Covenant*, 932 F.3d at 765–67 (quoting *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011)). Defendants do not dispute that Plaintiffs meet the second prong—they argue only that such loss is not traceable to Defendants.

With respect to the first prong, the 2019 Rule will cause Plaintiffs to experience frustration of mission and diversion of resources because of its impact on their naturalization workshops, which are one-day, one-stop events where Plaintiffs' staff and volunteers assist low-income LPRs with completing and submitting naturalization applications. Mot. 9. Applications submitted through these workshops are the primary vehicle for Plaintiffs to meet contractually specified funding targets. *See, e.g.*, Rodgers Decl.[2] ¶¶ 42–45; Stolz Decl. ¶¶ 44–49. Plaintiffs' ability to hold these workshops depends in large part on the applicants' ability to obtain a fee waiver and, specifically, a fee waiver based upon receipt of a means-tested benefit. Mot. 8. This is because means-tested benefit-based fee waivers require minimal documentation, which can typically be obtained before or during a workshop. Mot. 9–10. By contrast, the two other grounds on which an applicant can request a fee waiver require extensive documentation and follow-up, making them ill-suited for naturalization workshops. *Id.* at 10–11.

The 2019 Rule will cause Plaintiffs to divert considerable staff time and resources to continue this work, and these expenditures are not "ordinary program costs." Opp. 7. Each Plaintiff will be required to use staff time and money previously dedicated for other projects to overhaul their existing programs and training materials. *See, e.g.*, Rodgers Supp. Decl. ¶¶ 9–11; Chenoweth Supp. Decl. ¶ 3. For example,

[2] "Decl." refers to the declarations submitted in support of Plaintiffs' Motion for Preliminary Injunction and Memorandum of Points and Authorities (Dkt. 25), dated November 6, 2019. "Supp. Decl." refers to the declarations submitted in support of this reply memorandum.

Self-Help's partnership with San Francisco's Human Services Agency, which was premised solely on reaching means-tested benefit recipients, will become obsolete, and Self-Help will need to rebuild its entire outreach database from scratch. Chung Supp. Decl. ¶ 9. ILRC has already shifted resources from other citizenship promotion efforts, and will need to continue doing so to create additional community alert materials, as well as new educational materials for LPRs. Rodgers Decl. ¶¶ 29–30. The New Citizen Program ("NCP") and the New Citizens Campaign ("NCC") partners, which are funded by Seattle's Office of Immigrant and Refugee Affairs ("OIRA"), expect to devote time to "consulting with tax experts for questions about income verification and how to obtain tax transcripts," even as OIRA itself expends additional resources to update materials and provide technical assistance to NCC and NCP about the 2019 Rule. Kelly-Stallings Decl. ¶¶ 35-39; Kelly-Stallings Supp. Decl. ¶ 7-8. But for the enactment of the 2019 Rule, Plaintiffs would spend this money "on some other aspect of their organizational purpose." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015). This is precisely the type of harm that gives organizational plaintiffs standing. *Serv. Women's Action Network v. Mattis*, 352 F. Supp. 3d 977, 985 (N.D. Cal. 2018) (citing *Cegavske*, 800 F.3d at 1040) ("[T]he Ninth Circuit has specifically found diversion of resources for 'outreach campaigns' and educating the public . . . sufficient to establish organizational standing."); *see also SurvJustice Inc. v. DeVos*, 2018 WL 4770741, at *7 (N.D. Cal. Oct. 1, 2018) (organizational standing established where plaintiff diverted staff time to, among other things, "review[] and understand[]" the challenged policy).

Defendants seek to minimize these harms by noting that some of the Plaintiffs already help with income- and hardship-based applications. That argument does not address the fact that Self-Help does not handle such applications at their workshops. Chung Decl. ¶ 13. And even for those organizations that do process some such applications, those applications make up a tiny fraction of the total submitted, because they are so difficult and time-consuming to complete. Mot. 10–11. The 2019 Rule will make income- and hardship-based applications the *sole* avenue for fee waivers, causing an increase in these types of applications, and forcing Plaintiffs to expend their resources in drastically different ways. *Id.* at 9-11.

Defendants' suggestion that it is significant that "only one Plaintiff alleges it has *already* diverted any resources to prepare for the revisions" is beside the point. Opp. 8 (emphasis added). There is no such

requirement for standing at this stage. *See E. Bay. Sanctuary Covenant*, 932 F.3d at 764 ("[Plaintiffs] need only establish a *risk* or *threat* of injury to satisfy the actual injury requirement."). Moreover, it makes perfect sense that Plaintiffs would avoid expending precious resources until the 2019 Rule was finalized, announced, and effective, lest it undergo substantive changes before publication or be abandoned.

The 2019 Rule will also frustrate Plaintiffs' ability to achieve their missions. A plaintiff satisfies the frustration-of-mission element if it shows that the challenged policy will reduce or "discourage[] a large number of . . . individuals from seeking [its services]." *E. Bay Sanctuary Covenant*, 932 F.3d 766. Defendants acknowledge that the 2019 Rule will cause the number of fee waiver applications to drop from 594,000 to 350,000, a more than 40 percent decrease. AR 458. The 2019 Rule will effectively block LPRs who receive means-tested benefits, but who have incomes over 150 percent of the federal poverty guidelines ("FPG"), from ever applying to naturalize. Wong Decl. ¶ 24. The heightened evidentiary requirements imposed by the 2019 Rule will discourage many more still-eligible applicants from ever applying for naturalization. Mot. 7–8. Plaintiffs separately satisfy the frustration-of-mission element because "[b]ut for defendants' [conduct], Plaintiffs would be able to allocate substantial resources to other activities central to their missions." *Cegavske*, 800 F.3d at 1040 (quotation marks omitted). Plaintiffs share broad missions to help individuals obtain a variety of immigration benefits. Mot. 11. Because of the 2019 Rule, scarce resources Plaintiffs would have allocated elsewhere to carry out their missions will instead be spent responding to the dramatic changes effected by the 2019 Rule. *See supra* pp. 2–5; *see also* Rodgers Supp. Decl. ¶ 11 (NAC staff members have had to "postpone or set aside other work . . . to accommodate individual appointments"); Chung Supp. Decl. ¶ 5 (Self-Help has diverted resources from other "routine work such as passport renewals, green card renewals, family-based petitions, and citizenship test preparation"). Even with this diversion of resources, the complexities added by the 2019 Rule reduce the number of clients Plaintiffs can serve. *See, e.g.*, Mot. 8–9.

In response to this showing, Defendants offer an array of meritless arguments. First, they blithely assert that "under Plaintiffs' own theories, the revised Form makes their services *more* valuable to those they serve." Opp. 9. But the fact that Plaintiffs' services are more necessary does not change the fact that the 2019 Rule will make it far more challenging for Plaintiffs to provide them. Next, Defendants assert that Plaintiffs' showing of harm is "speculative" because each Plaintiff has its own estimate of the time-

burden associated with the new requirements imposed by the 2019 Rule. *Id.* This argument is frivolous: the Organizational Plaintiffs vary in size, structure, and resources; it is hardly surprising that they expect to bear different burdens. More fundamentally, Defendants do not deny that *all* Plaintiffs will be forced to devote significantly increased staff time and resources to comply with the 2019 Rule. This is what matters for standing purposes. *See, e.g.*, *Cegavske*, 800 F.3d at 1040. Defendants next claim that Plaintiffs can reduce "the time spent on an applicant," which ignores the realities of the 2019 Rule. Opp. 9. For example, Defendants posit that Plaintiffs can refer more cases to one-on-one services. But one-on-one services are *more* time-intensive, not less, and some Plaintiffs have never provided them. *See* Rodgers Decl. ¶¶ 42–45; Núñez Decl. ¶¶ 40–43; Chenoweth Decl. ¶¶ 41–44; Stolz Decl. ¶¶ 44–49; Chung Decl. ¶¶ 40–41. Finally, Defendants argue that Plaintiffs have failed to identify an existing or prospective client harmed by the 2019 Rule and that "a material number of clients must be . . . affected," Opp. 9, despite the fact that plaintiffs "need only establish a *risk* or *threat* of injury to satisfy the actual injury requirement." *E. Bay. Sanctuary Covenant*, 932 F.3d at 764. In any event, there is no doubt that the 2019 Rule will make some LPRs entirely ineligible for a fee waiver, since Defendants estimate that the number of fee waiver applications will fall by nearly 40 percent. AR 458.

B. Plaintiffs' Injuries Are Fairly Traceable To The 2019 Rule.

Each of the injuries described above is solely attributable to the 2019 Rule: but for the rule change, Plaintiffs would not lose funding, divert resources, or experience frustration of their missions. *See, e.g.*, *In re Google, Inc. Privacy Policy Litig*, 58 F. Supp. 3d 968, 979 (N.D. Cal. 2014) (injuries fairly traceable on but-for causation theory). Defendants acknowledge that Plaintiffs stand to lose funding but contend that the loss is not traceable to the 2019 Rule.[3] First, they suggest that nothing on the face of the 2019 Rule suggests that Plaintiffs will suffer a reduction in the number of clients they are able to serve, ignoring their own concession: the purpose and effect of the 2019 Rule will be to significantly reduce the number of fee waiver applicants. Second, they argue that, because third parties dictate the contractual terms of Plaintiffs' funding arrangements, a loss of funding cannot be caused by government action. The fact that Plaintiffs' funders could choose to offer funding on different terms in the future does not change the fact that, if the 2019 Rule goes into effect, they will lose funding that they are currently assured under existing

[3] Defendants do not dispute traceability for diversion of resources and frustration of mission.

grants. *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 953 (9th Cir. 2013) ("[Simply because] contractual obligations may provide the basis for [] economic [injury] . . . hardly means that the [regulation] itself is not the direct cause of that [injury]." (citation and quotation marks omitted)); *see also Brill v. Chevron Corp.*, 2017 WL 76894, at *3 (N.D. Cal. Jan. 9, 2017) (defendants' actions need not be "the very last step in the chain of causation" (quoting *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997)). Further, the Ninth Circuit foreclosed this argument in *E. Bay Sanctuary Covenant*, in which the organizational plaintiffs, whose funding from third parties depended on the number of asylum applications they submitted, challenged changes to asylum policy. 932 F.3d at 754, 766–67. The challenged policy did not, on its face, render plaintiffs' clients "categorically ineligible for asylum." *See id.* at 767. But the plaintiffs alleged that a majority of the organizations' clients would in practice be barred by the rule, and the Ninth Circuit found that the likely reduction in the number of their clients, and the loss of third-party funding that would result from such a reduction, was sufficient to confer standing. *Id.* at 767. The 2019 Rule will affect Plaintiffs in the same manner by reducing the number of clients they can effectively serve.[4]

II. PLAINTIFFS ARE WITHIN THE INA'S ZONE OF INTERESTS.

Defendants wrongly contend that Plaintiffs are outside the zone of interests of the Immigration and Nationality Act ("INA") and that Plaintiffs' economic interests are not even "marginally related" to the 2019 Rule. Opp. 12.

Although the class of plaintiffs within a statute's zone of interests is limited, "the test is not especially demanding" under the APA, where "the benefit of any doubt goes to the plaintiff." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129–30 (2014) (quotation marks omitted). The zone of interests test "forecloses suit only when a plaintiff's interests are so marginally related to or

[4] Defendants contend that Seattle cannot assert standing based on loss of tax revenue caused by the 2019 Rule because (1) Seattle only alleges that Washington State's tax revenue will be affected, and (2) the causal link between the 2019 Rule and Seattle's lost tax revenue is too attenuated. Opp. at 12 n.7. But a municipality has standing "to protect its own proprietary interests," including "ero[sion of] its tax revenue." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197–99 (9th Cir. 2004). Contrary to Defendants' assertion, higher rates of naturalization have a tangible impact on *Seattle's* economic interests, including through higher rates of homeownership and sales tax revenue. *See* Am. Compl. ¶ 229; Kelly-Stallings Decl. ¶¶ 41–49. It is thus "reasonably probable" that these economic interests will be harmed by the reduction in number of naturalized Seattle residents caused by the 2019 Rule. *See City of Sausalito*, 386 F.3d at 1199. *See also* Kelly-Stallings Supp. Decl. ¶ 10–11.

inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id.* (quotation marks omitted). Plaintiffs, in contrast, serve the individuals who are most directly impacted by the 2019 Rule, and their ability to continue to do so will be significantly impeded by the Rule. These interests are hardly "marginal" or "inconsistent" with the purposes of the INA. Furthermore, the INA envisions Plaintiffs' roles; funds them; and *requires* the government to work with them in order to "promote the opportunities and responsibilities of United States citizenship." 8 U.S.C. § 1443(h). In fact, fees collected pursuant to 8 U.S.C. § 1356, the very section Defendants cite as authorizing the 2019 Rule (AR 492), are used to fund local governments and nonprofit naturalization service providers through USCIS's Citizenship and Assimilation (formerly Integration) Grant Program.[5] Several Plaintiffs are past and current recipients of these grants.[6]

Although Defendants rely (at Opp. 13) on an opinion in *INS v. Legalization Assistance Project of L.A. Cty. Fed'n of Labor*, the Ninth Circuit in *E. Bay Sanctuary Covenant* rejected that opinion as "non-binding" and "speculative," and found that "the interest asserted by the organization in [*INS*]—conserving organizational resources to better serve *non*immigrants—is markedly different from the interest in aiding immigrants asserted here." 932 F.3d at 769 n. 10 (emphasis in original). So too, here.

Finally, Seattle's financial interest in the naturalization of its residents, *see* Kelly-Stallings Decl. ¶¶ 41–49, further places it within the zone of interests. *See Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1304 (2017) (holding that Miami's financial injuries were within the zone of interests of the Fair Housing Act when discriminatory lending "reduced property values, diminishing the City's property-tax revenue and increasing demand for municipal services").

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. Defendant Cuccinelli Was Not Lawfully Serving As The Acting Director Of USCIS

[5] Dep't. of Homeland Security, U.S. Citizenship & Immigration Services, FY 2016/2017 Immigration Examinations Fee Account Fee Review Supporting Documentation Addendum, at 17 (Oct. 2016), https://bit.ly/2XMVqsg; *see also* https://bit.ly/2KSncP6 for eligibility information.

[6] For example, CARECEN received this funding (in 2009, 2012, 2015, and 2017), as has OneAmerica (2009), and CLINIC (2010, 2011). *See* https://bit.ly/35xa8X3. And several of Seattle's partner organizations in its two naturalization programs are current and past recipients of USCIS grants. Kelly-Stallings Supp. Decl. ¶ 4.

When the 2019 Rule Became Final, And It Therefore Has No Force or Effect.

Defendants do not seriously contest that Defendant Cuccinelli's purported service as Acting Director of USCIS violates the Federal Vacancies Reform Act (FVRA). Instead, they seek to avoid the import of that illegality by making the demonstrably false claim that USCIS took no action on the 2019 Rule under Cuccinelli. They contend that Cuccinelli had not yet been placed in the Acting Director role on June 5, 2019, when USCIS published its third and final public notice regarding the rule,[7] and that USCIS "had no further substantive role to play in effecting the Form revisions" after that date. Opp. 22. The administrative record belies that assertion. Cuccinelli purported to be the Acting Director on September 6, when USCIS submitted a table of changes to Form I-912 to OMB, AR 407; on October 7, when USCIS submitted its supporting statement, AR 450, *see* n.15; on October 16, when USCIS completed its submission to OIRA, AR 461 ("OMB has taken action on your request received on 10/16/2019"); and on October 25, when USCIS published the final form and announced the Policy Alert and Policy Manual revisions, AR 484.

On each of those dates, Cuccinelli's service as Acting Director of USCIS was unlawful, and his actions *ultra vires*. Under the FVRA, when an official vacates a role requiring Senate confirmation under the Appointments Clause, "the first assistant to the office of such officer shall" become the acting official, 5 U.S.C. § 3345(a)(1), unless the President "override[s] the automatic operation of (a)(1)" by selecting a different individual with leadership experience in the federal government. *Hooks v. Kitsap Tenant Support Servs.*, 816 F.3d 550, 557 (9th Cir. 2016). The (a)(1) "automatic" succession provision refers exclusively to the individual serving as the first assistant at the time the vacancy occurs—here, Mark Koumans, not Ken Cuccinelli. 144 CONG. REC. S11037 (daily ed. Sept. 28, 1998) (statement of Senator Lieberman) ("[B]y the terms of the bill, a first assistant apparently can take over only if he or she was the first assistant at the time of the vacancy."). If the maneuver that ostensibly placed Cuccinelli in the role of Acting Director were legal, the FVRA would have failed to ensure that an acting official have any government experience at all, because literally anyone could be placed in the first assistant position after the fact. *Cf.*

[7] Defendants suggest that USCIS actually *submitted* the rule to OIRA on June 5, Opp. 5, but the Administrative Record documents the submission date as October 16. AR 461. Three documents submitted by USCIS to OIRA after June 5 are conspicuously undated in the Index. Dkt. 48-2 at 2–3.

Hooks, 816 F.3d at 564 (legislative history "suggests that the FVRA was motivated by a desire to reassert the Senate's confirmation power in the face of what was seen as executive overreach"); *Olympic Fed. Sav. & Loan Ass'n v. Dir., Office of Thrift Supervision*, 732 F. Supp. 1183, 1198 (D.D.C. 1990) (vacancies laws "strictly and narrowly interpreted").

In its brief footnote on the merits of this argument, Defendants claim that because Section 3345(a)(3) includes a tenure requirement for an individual placed in the acting role pursuant to that provision, the absence of a tenure requirement in (a)(1) demonstrates that none exists. Opp. 22 n.12. The better reading, however, is that Congress did not include a tenure requirement in (a)(1) because it did not anticipate that any selection at all could occur under (a)(1)—as the only relevant first assistant would be the one serving at the time of the vacancy. The other argument at which Defendants gesture has been foreclosed by the Supreme Court's decision in *NLRB. v. SW Gen., Inc.*, 137 S. Ct. 929 (2017), which makes clear that there is no conflict between interpreting (a)(1) to apply only to the first assistant serving at the time the vacancy begins and the text of § 3345(b)(1). Because (b)(1) applies not only to first assistants acting through (a)(1), but also to acting officials selected by the President through (a)(2) or (a)(3), the category of acting officials who "did not serve in the position of first assistant to the office of such officer," 5 U.S.C. § 3345(b)(1)(A)(i), is not superfluous.

Given that Cuccinelli's appointment was unlawful, any actions that he takes while in office—including the 2019 Rule—"shall have no force or effect." 5 U.S.C. § 3348(d)(1). Despite the Government's protestations, the 2019 Rule was an "action" taken by Cuccinelli while performing a "function or duty" of the USCIS head. *Id.* at 5 U.S.C. § 3348(a)(2). That "function or duty" is established by statute, *see* § 3348(a)(2)(A), in two ways. First, the USCIS Director "shall establish the policies for performing" functions including "[a]djudications of naturalization petitions," 6 U.S.C. § 271(a)(3)(A); (b)(2). Second, the Paperwork Reduction Act mandates that the "head of each agency shall be responsible for . . . complying with [its] requirements." 44 U.S.C.A. § 3506(a)(1).

Moreover, because the FVRA's definition of "agency action" is coextensive with the APA's, *compare* 5 U.S.C. § 3348(a)(1) *with id.* § 701(b)(2) (both referencing *id.* § 551(13)), Defendants' claim that the action was complete on June 5 rests on the premise that USCIS's June 5 submission to OMB was the "final agency action" reviewable under the APA, *id.* § 704. But the June 5 submission neither

"mark[ed] the consummation of the agency's decisionmaking process" nor was it an action "by which rights or obligations have been determined, or from which legal consequences will flow"—two conditions which the Supreme Court has articulated for a final agency action. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quotation marks omitted).

B. The 2019 Rule Is Procedurally Invalid.

After spending the last year proclaiming that the 2019 Rule was a way to "stem the tide" of fee-waived applications by cutting them nearly in half, Opp. 1 and AR 458, Defendants—in an attempt to demonstrate that the 2019 Rule is not subject to the APA's procedural requirements—restyle the rule as a "technical" measure that is "procedural" or, barring that, "interpretative." Opp. 14–17. The rebranding is too late,[8] and in any event, it misses the point: rules of procedure and interpretation may absolve a failure to comply with the APA only when a rule does not affect "individual rights and obligations," *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979), is not "binding on the individuals to whom [it] appl[ies] in the same way statutes are," and is not "prescriptive, forward-looking, and of general applicability." *Save Our Valley v. Sound Transit*, 335 F.3d 932, 954–55 (9th Cir. 2003).

1. The 2019 Rule Is Not A Procedural Rule.

Procedural rules cover only "housekeeping" matters, *Chrysler Corp.*, 441 U.S. at 283, that do not "impose new substantive burdens." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 5 (D.C. Cir. 2011). The 2019 Rule is far more than just a change to "the manner in which parties present themselves or their viewpoints to the agency," as would be characteristic of a procedural rule. *United States v. Gonzales & Gonzales Bonds & Ins. Agency*, 728 F. Supp. 2d 1077, 1084 (N.D. Cal. 2010). Instead, consistent with USCIS's stated intent, it will make some applicants completely ineligible for a fee waiver, thereby altering their "underlying rights or interests." *Id.*

Defendants' cases are not to the contrary. In quoting *JEM Broad. Co. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994), Defendants use an ellipsis to omit key language—that "financial qualifications" are the type of changes to "substantive standards" that take a rule change outside "the realm of the procedural."[9]

[8] As the Supreme Court has counseled, a court should not credit "*post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

[9] Defendants omit the same language when they cite *James V. Hurson Assocs. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000).

(quotation marks omitted). *Compare* Opp. 15 *with JEM Broad.*, 22 F.3d at 327. The heart of the 2019 Rule is a change to the financial qualifications for fee waivers; it thus cannot be procedural. Next, Defendants rely on *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1055 (D.C. Cir. 1987), claiming that so long as the "standard of review" remains the same, the "focus and timing of review are matters for agency discretion." Opp. 15; *but see Bowen*, 834 F.2d at 1051 ("[w]ere [the agency] to have inserted a presumption of invalidity when reviewing certain operations, its measures would surely require [APA] notice and comment."). By establishing a *per se* rule that evidence of a means-tested benefit cannot establish fee waiver eligibility, the 2019 Rule changes the substantive standard of review, not just the agency's "focus" and "timing." Finally, Defendants seek support in *United States v. Gonzales & Gonzales*, 728 F. Supp. 2d 1077. But that case concerned only which particular body heard agency appeals—exactly the type of "internal organization" for which procedural rules are used. *Id.* at 1085.

2. The 2019 Rule Is Not An Interpretative Rule.

Defendants argue in the alternative that if the 2019 Rule is not procedural, it is interpretative. Opp. 16–17. Not so; the 2019 Rule effectively *adds* to and *amends* 8 C.F.R. § 103.7(c), a legislative rule; it does not *interpret* that provision. *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087–88 (9th Cir. 2003) (an interpretative rule may not "add to" or "amend" a legislative rule). Section 103.7(c) provides that fee waivers may be granted when "[t]he party requesting the benefit is unable to pay the prescribed fee," 8 C.F.R. § 103.7(c)(1)(i), and specifies the procedure that applicants are to follow: (1) submit a written request for a waiver, (2) state the reasons for inability to pay, and (3) provide evidence to support the reasons, *id.* § 103.7(c)(2). The 2019 Rule adds to the regulation in two substantial respects. ***First,*** it heightens procedural requirements by requiring use of the I-912 form and hard-to-obtain IRS tax transcripts. AR 503–09. ***Second,*** it replaces the flexible "inability to pay" standard with a rigid income threshold that disqualifies many applicants who satisfy the terms of the legislative rule.

Mora-Meraz v. Thomas, 601 F.3d 933, 940 (9th Cir. 2010), is not to the contrary. There, the court found that a regulation requiring a "verifiable documented drug abuse problem" for admission to a drug-abuse program was interpreted, not amended, by a Bureau of Prisons rule requiring a showing of drug use within the preceding year. *Id.* at 940. However, the underlying legislative rule at issue in *Mora-Meraz* was silent as to how prisoners were to prove the existence (let alone time period) of a "drug abuse

problem," leaving a clear gap for the agency to fill. In contrast, 8 C.F.R. § 103.7 sets forth a flexible procedure for applicants to follow in proving their eligibility for a fee waiver; the agency is not free to further restrict those procedures without going through notice-and-comment rulemaking once more.

C. The 2019 Rule Is Arbitrary And Capricious.

The 2019 Rule should be set aside as arbitrary and capricious because Defendants have failed to "cogently explain why [they have] exercised [their] discretion in a given manner." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 48–49 (1983). Defendants point to cursory statements of the agency's reasons proffered in the final public notice. Opp. 18–21. But as Defendants acknowledge, agency reasoning is not entitled to deference when the agency has "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 945 (9th Cir. 2010). Here, Plaintiffs and other public commentators introduced evidence into the administrative record to show that (1) the FPG is not an adequate measure of ability to pay, *see, e.g.*, AR 5305–06; (2) the additional burden of proving income will deter many eligible applicants from applying and devastate Plaintiffs' efforts to help them do so, *see, e.g.*, AR 3242–57; and (3) obtaining tax transcripts is extremely difficult for low-income LPRs, *see, e.g.*, AR 4367–68. Defendants failed to meaningfully grapple with this evidence.

First, Defendants fail to respond to Plaintiffs' argument that the agency did not "take into consideration the increased burden that will be placed on other applicants, legal-service providers, and even the agency" by its new rule, Mot. 15, and the likely consequence that eligible, needy immigrants will be prevented from applying for naturalization at all. Merely stating and restating countervailing concerns about revenue and inconsistency, Opp. 18–19, does not show that the agency actually *considered* concerns about access to naturalization.

Second, Defendants identify nothing *in the administrative record* to justify their choice, in the face of numerous dissenting public comments, to rely primarily on the FPG in assessing "ability to pay." Opp. 20. They now argue that the Guidelines must be a reasonable measure of ability to pay because that is the FPG's "primary purpose," and the federal government should not be required to rely on state-administered programs. *Id.* This Court should not credit these "*post hoc* rationalizations for agency action." *Burlington Truck Lines*, 371 U.S. at 168–69. Defendants further claim that a challenge to the agency's reliance on

the FPG is time-barred. Opp. 19. That argument is frivolous: Plaintiffs do not challenge USCIS's long-standing *acceptance* of evidence that an individual earns less than 150% of the FPG; rather, they challenge USCIS's 2019 decision to increase its reliance on the FPG to the exclusion of other evidence.

Third, the agency has not offered a plausible reason for requiring applicants to undertake the highly burdensome process of obtaining tax transcripts to prove their incomes. While some unspecified number of individuals may have submitted incomplete copies of tax returns under the prior rule, Opp. 20–21, there is no persuasive reason, and certainly none articulated by USCIS, why eligible applicants should bear the burden of those incorrect submissions. If anything, it beggars belief that Defendants would claim they are trying to avoid rejecting fee waiver applications, when they have previously admitted that income-based applications are the *most* likely to be rejected.[10] And there is no persuasive reason why tax transcripts—hard-to-obtain, stripped-down summaries of tax returns, which the President has called "notoriously inaccurate"—would do a better job of demonstrating an individual's income. Am. Compl. ¶ 12.

D. The 2019 Rule Is Inconsistent With 8 C.F.R. § 103.7(c) and Past Agency Practice.

Defendants claim that 8 C.F.R. § 103.7(c) affords them wide latitude in reviewing fee waiver requests and sets forth a demanding procedure for applicants. Opp. 21. Yet the regulation requires only that each request (1) be in writing, (2) "state the person's belief that he or she is entitled to or deserving of the benefit requested," (3) state "the reasons for his or her inability to pay," and (4) provide "evidence to support the reasons indicated." 8 C.F.R. § 103.7(c)(2). Notably absent from this list is a requirement that the applicant use a specific form such as Form I-912, or that the evidence provided fit into one of two categories: income as measured by the FPG, or extraordinary hardship. And USCIS recognized as recently as 2018 that "the use of a USCIS-published fee-waiver request form is not mandated by regulation" and, as a result, applicants need not use Form I-912. AR 44, 149. Defendants' about-face is unsupported by any "reasoned explanation," *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016), and in any event it is, by their own previous admission, inconsistent with the regulation.

IV. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF.

As discussed above, *see supra* pp. 2–5, the 2019 Rule will cause Plaintiffs to divert substantial resources, experience a frustration of their missions, and lose funding. Absent a preliminary injunction,

[10] 2016 USCIS Ombudsman Ann. Rep., at 72, https://bit.ly/2KUkIzF.

these injuries will materialize immediately, causing irreparable harm to Plaintiffs. For example, Plaintiffs will need to, among other things, immediately (i) shift financial and staffing resources from other immigration projects to conduct additional one-on-one naturalization appointments, (ii) draft guidance advising clients and stakeholders of the changes to the fee waiver process, and (iii) in response to funding losses, diminish or cut positions related to naturalization work. Rodgers Supp. Decl. ¶ 8; Chenoweth Decl. ¶ 32; Chenoweth Supp. Decl. ¶ 6; Kelly-Stallings Decl. ¶¶ 7-10. By Defendants' own admission, these harms are not speculative and are directly caused by the 2019 Rule: they concede the additional time-burden the 2019 Rule adds to naturalization applications, and they acknowledge that the 2019 Rule will have the effect of lowering the number of fee waiver requests that are submitted (and by extension, naturalization applications) by nearly 40 percent. AR 458.

By contrast, if the 2019 Rule is preliminarily enjoined, Plaintiffs' workshops will continue in their current form. Further, an entire swath of fee waiver applicants who make up large portions of Plaintiffs' clients—that is, applicants seeking fee waivers based on receipt of a means-tested benefit—will continue to submit applications. This would eliminate, at least for the time being, the likelihood that Plaintiffs will lose substantial funding. Moreover, "the general rule that economic harm is not normally considered irreparable does not apply where there is no adequate remedy to recover those damages, such as in APA cases." *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1116 (N.D. Cal 2018) (alteration and quotation marks omitted).

V. THE BALANCE OF EQUITIES STRONGLY FAVORS PLAINTIFFS.

The "balance of equities" and the public interest both favor the Plaintiffs, who will suffer irreparable harm (*see supra* Section IV) if the 2019 Rule stays in effect, impairing their ability to provide naturalization services across the United States.

Defendants argue that preserving the status quo would require USCIS to "forgo requiring evidence that is most likely to identify applicants in need of a fee waiver." Opp. 24. But Defendants' own justifications for the 2019 Rule belie this argument: they "revised the criteria" to *eliminate* key evidence (receipt of a means-tested benefit) that is most likely to identify applicants in need of a fee waiver in order to "curtail[] the rising costs of fee waivers." *Id.* at 4, 19 (alteration in original). Preserving the status quo will mean that USCIS will continue to follow the same fee waiver process that has been in place since

2010—an outcome expressly endorsed by this district. *See Ramos v Nielsen*, 336 F. Supp. 3d 1075, 1080 (N.D. Cal. 2018) (preliminary injunction was appropriate to preserve the status quo where the "government [] failed to establish any real harm were the status quo . . . maintained"). Defendants also contend that Plaintiffs' services are not "legally necessary," (Opp. 24), to applicants. As a practical matter, just as in *Campos v. INS*, 70 F. Supp. 2d 1296 (S.D. Fla. 1998), Plaintiffs' services are indispensable to applicants who rely on, for instance, Plaintiffs' provision of translators at their events,[11] regardless of whether some applicants would be able to complete the process without Plaintiffs' legal services.

VI. THE COURT SHOULD ENTER A NATIONWIDE INJUNCTION.

Defendants argue that the Court "should be limited to redressing only any established injuries to Plaintiffs." Opp. 25. But Plaintiffs have established that they will suffer nationwide injuries absent nationwide relief. Two of the plaintiffs, ILRC and CLINIC, serve clients located throughout the United States and provide naturalization application clinics and workshops nationally. Rodgers Decl. ¶¶ 3–5; Chenoweth Decl. ¶¶ 4–9. Any relief limited to certain cities and/or states would be insufficient to remedy the formidable and irreparable, nationwide harms that will befall these organizations.

Furthermore, varied implementation of the 2019 Rule across the United States would result in disparate treatment of LPRs across the United States—an outcome expressly contemplated and rejected by the Ninth Circuit. *See Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018). A nationwide preliminary injunction is the standard remedy for the enjoinment under the APA of agency regulations that will echo nationally. *Id.* at 512 (nationwide injunctions "commonplace"). Defendants point (Opp. 25) to a recent stay of a nationwide injunction in *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019), in support of a more "narrowly tailored" injunction. But *East Bay* concerned asylum applications from immigrants entering the United States through a small number of states at the southern border, making a narrowly tailored injunction appropriate. The 2019 Rule will apply to all applicants for naturalization across the United States, and a nationwide remedy is necessary.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Plaintiffs' Motion (Dkt. 25), Defendants' 2019 Rule should be preliminarily enjoined nationwide.

[11] *See* Am. Compl. ¶¶ 59, 101; Kelly-Stallings Decl. ¶ 22.

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MAYER BROWN LLP

By: */s/ Lauren R. Goldman*

Lauren R. Goldman (*pro hac vice)*
Matthew D. Ingber (*pro hac vice)*
Niketa K. Patel (*pro hac vice)*
Maura K. McDevitt*
Nicolas E. Rodriguez (*pro hac vice)*
Luc W. M. Mitchell (*pro hac vice)*
mingber@mayerbrown.com
lgoldman@mayerbrown.com
npatel@mayerbrown.com
mmcdevitt@mayerbrown.com
nerodriguez@mayerbrown.com
lmitchell@mayerbrown.com
1221 Avenue of the Americas
New York, New York 10020-1001
Telephone: (212) 506-2500
Facsimile: (212) 849-5973

Lee H. Rubin (CA Bar No. 141331)
lrubin@mayerbrown.com
Two Palo Alto Square, Suite 300
Palo Alto, California 94306
Telephone: (650) 331-2037
Facsimile: (650) 331-4537

PROTECT DEMOCRACY PROJECT

By: */s/ Jessica Marsden*

Jessica Marsden (*pro hac vice)*
jess.marsden@protectdemocracy.org
510 Meadowmont Village Circle, No. 328
Chapel Hill, North Carolina 27517
Telephone: (202) 579-4582
Facsimile: (929) 777-8428

Jamila Benkato (CA Bar No. 313646)
jamila.benkato@protectdemocracy.org
2020 Pennsylvania Avenue, Suite 163
Washington, D.C. 20006
Telephone: (202) 579-4582
Facsimile: (929) 777-8428

Benjamin Berwick*
ben.berwick@protectdemocracy.org
15 Main St., Suite 312
Watertown, Massachusetts 02472
Telephone: (202) 579-4582
Facsimile: (929) 777-8428

Rachel Goodman*
rachel.goodman@protectdemocracy.org
115 Broadway, 5th Floor

New York, New York 10006
Telephone: (202) 579-4582
Facsimile: (929) 777-8428

ASIAN AMERICANS ADVANCING JUSTICE | AAJC

By: */s/ Niyati Shah*
Niyati Shah (*pro hac vice)*
Marita Etcubanez*
nshah@advancingjustice-aajc.org
metcubanez@advancingjustice-aajc.org
1620 L Street, NW, Suite 1050
Washington, D.C. 20036
Telephone: (202) 815-1098
Facsimile: (202) 296-2318

PETER S. HOLMES
Seattle City Attorney

By: */s/ Erica R. Franklin*
Erica R. Franklin*
Assistant City Attorney
Peter S. Holmes*
Seattle City Attorney
erica.franklin@seattle.gov
peter.holmes@seattle.gov
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, Washington 98104
Telephone: (206) 684-8200
Facsimile: (206) 684-8284

Attorneys for Plaintiffs

** Pending pro hac vice admission*