19-3591

United States Court of Appeals for the Second Circuit

STATE OF NEW YORK, ET AL.,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York
Case No. 1:19-cv-07777-GBD
Honorable George B. Daniels, District Judge

Brief of *Amici Curiae* National Consumer Law Center, Legal Aid Justice Center, Public Citizen, Inc., Consumer Action, Equal Justice Society, Impact Fund, Secure Justice, Media Alliance, Americans for Financial Reform Education Fund, and New Economy Project In Support of Plaintiffs-Appellees

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4), *Amici Curiae* state that they are, respectively, tax-exempt nonprofit corporations with no parent corporations and that no publicly held corporation owns ten percent or more of their stock.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The **National Consumer Law Center** ("NCLC") is a nonprofit organization that possesses a unique expertise and interest because of its many years of work protecting the rights of consumers regarding the use of credit reports and credit scores. NCLC is recognized nationally as an expert on credit scores, credit reports and the Fair Credit Reporting Act ("FCRA"), and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for 50 years. NCLC has testified numerous times before Congress regarding credit reports and credit scores, regularly submit comments to regulators in rulemakings and other administrative proceedings regarding credit reports and scores, and have issued special reports on credit reporting issues. Undersigned counsel are principal and contributing authors of National Consumer Law Center, *Fair Credit Reporting* (9th ed. 2017), the primary treatise in this field, which comprehensively compiles judicial decisions, as well as regulatory and statutory developments, related to the FCRA.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Local Rule 29.1(b), *Amici Curiae* state that no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *Amici Curiae*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

NCLC's interest in this appeal flows from its efforts to protect the integrity of consumers' rights with respect to credit reports and scores. The U.S. Department of Homeland Security's ("DHS") requirement to consider credit reports and credit scores is an ill-advised, inappropriate, and harmful use of these tools.

The **Legal Aid Justice Center** ("LAJC") is a Virginia nonprofit legal aid organization that provides legal advice and direct legal representation each year to thousands of low-income individuals who cannot afford private counsel in civil practice areas such as consumer protection, landlord-tenant, employment, immigration, and civil rights. LAJC's interest in this appeal flows from its decades-long history of representing low-income immigrants, both in civil actions arising out of credit and debt collection problems and in immigration matters before the United States Citizenship and Immigration Services. LAJC has helped hundreds of immigrants with varying legal statuses solve problems related to medical debt, wrongful evictions, and predatory lending—all of which affect their credit score—and LAJC knows from firsthand experience that solving these problems takes great effort and the exercise of legal skill, but can be instrumental in helping immigrant families thrive and prosper in the United States. LAJC's experience has allowed it to see firsthand the complexity of the consumer credit landscape and its many shortcomings in failing to adequately protect immigrant

consumers, as well as to see firsthand the hugely beneficial effects on family income that come when an immigrant obtains a work permit or lawful permanent residency.

Public Citizen, Inc., a consumer-advocacy organization with members and supporters nationwide, works before Congress, administrative agencies, and courts for the enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has litigated issues arising under the FCRA and filed comments in the rulemaking proceeding that resulted in the rule under review opposing the proposed use of credit reports and credit scores by DHS to assess whether an applicant for admission or adjustment of status is likely to become a public charge. Public Citizen is concerned about the practice of using credit reports and credit scores for purposes other than the purpose for which they were designed—to enable a lender to determine whether to extend credit to a consumer.

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A nonprofit 501(c)(3) organization, Consumer Action focuses on consumer education that empowers low-and moderate-income and limited-English-speaking consumers to financially prosper.

Consumer Action's mission is to educate and advocate for consumers who face an imbalance of power in the marketplace. For decades, Consumer Action has worked to improve the accuracy and reliability of credit reports and credit scores,

to hold credit reporting agencies accountable for the information they retain and sell, and to improve the dispute process for individuals who risk loss of access to credit, employment and insurance because of inaccurate data connected to their names in credit bureau files. Consumer Action has advocated before lawmakers and regulators to advance consumer rights and promote industry-wide change. Consumer Action has frequently submitted comments on credit report, credit score and credit bureau-related regulations and practices, and has regularly been sought out for feedback by the credit reporting industry. Consumer Action educates individuals with free financial materials, in Spanish, Chinese, Korean, Vietnamese, and English, to help consumers assert their rights in the marketplace and make financially wise decisions. As an organization dedicated to educating and advocating for underserved communities, including immigrants and other limited-English proficient consumers, Consumer Action has uncommon access to these communities and retains a unique position in the marketplace to express strong opposition to the use of credit scores and credit reports in determining an immigrant's likelihood of becoming a public charge.

The **Equal Justice Society** ("EJS") is transforming the nation's consciousness on race through law, social science, and the arts. Through litigation and legislative advocacy, EJS challenges racially discriminatory and unlawful

practices and policies that deprive people of economic stability and the opportunity to thrive, such as the Public Charge Rule.

The **Impact Fund** is a nonprofit legal foundation that provides strategic leadership and support for impact litigation to achieve economic and social justice. It provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as counsel in a number of major civil rights cases, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws. The Impact Fund believes that the federal notice and comment process is critical to the creation and implementation of fair and non-discriminatory laws.

Secure Justice is a non-profit organization advocating against state abuse of power, and for reduction in government and corporate over-reach. It targets change in government contracting and corporate complicity with government policies and practices that are inconsistent with democratic values and principles of human rights. It believes the Public Charge Rule is one such policy or practice that is anti-American, anti-immigrant, and adverse to human rights.

Media Alliance is a 43-year-old San Francisco Bay Area democratic communications advocate. It focuses on the intersections of communications, technology, and equity. Its members include professional and citizen journalists

and community-based media and communications professionals who work with the media. Many of its members work on hot-button issues and with sensitive materials, and their online privacy and that of the communities they cover is a matter of great professional and personal concern. Its interest in this case flows from the need for governmental use of private sector products like credit reporting to be used appropriately and in the public interest with restraints to protect potential discriminatory impacts and violations of the privacy rights of individuals residing in or hoping to reside in, the United States of America.

Americans for Financial Reform Education Fund ("AFREF") is an independent, nonprofit coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups working to lay the foundation for a strong, stable, and ethical financial system. Through policy analysis, education, and outreach, AFREF actively engages in advocacy for stronger consumer financial protections, including protecting the rights of consumers with regard to the use of credit reports and scores. AFREF's interest in this appeal comes from its advocacy to protect consumers' rights and privacy with respect to the use of credit reports and scores. AFREF believes that DHS' requirement to consider credit reports and scores for immigration purposes is an inappropriate and harmful use of these tools.

New Economy Project works with New York City groups to promote community economic justice and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty. New Economy Project provides direct services to thousands of low-income New Yorkers through a legal hotline; builds the capacity of legal services and community-based organizations to address consumer financial justice issues; and advocates for systemic reform. The issues raised in this litigation are of vital interest to the communities that New Economy Project serves, which include immigrants and their families.

SUMMARY OF ARGUMENT

Plaintiffs-Appellees' argument that the "Public Charge Rule" issued by the U.S. Department of Homeland Security ("DHS") is arbitrary and capricious in violation of the Administrative Procedure Act ("APA") is shown by, among other things, its retention of a requirement in the rule that U.S. Citizenship and Immigration Services ("USCIS") consider an immigrant's credit history and credit score.

The Public Charge Rule requires USCIS to use an immigrant's credit history and score in considering whether an immigrant's assets, resources, and financial status make an immigrant more likely than not to become a public charge at any time in the future. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292,

41,503 (final Aug. 14, 2019). The administrative record reveals that nearly 400 submissions identified concerns about the use of credit scores and credit histories in public charge determinations. However, DHS failed to address these concerns, or its responses were inadequate or contrary to the evidence. Instead, despite comprehensive comments about the use of credit scores and credit histories, the Final Rule is nearly identical to the Proposed Rule, with only the addition of a requirement to consider additional debts not on a credit report.

First, DHS failed to adequately respond to comments stating that credit scores and reports are not designed, and are not an appropriate tool, for determining public charge status. DHS specifically failed to address the fact that the Consumer Financial Protection Bureau ("CFPB") has explained that credit scores are specifically designed to measure the likelihood that a borrower will become 90 days late on a loan.

Second, DHS failed to adequately address the fact that credit reports have unacceptably high levels of errors, as documented by the Federal Trade Commission. DHS simply responded that USCIS would not consider errors verified by a credit bureau, but failed to address how dysfunctional the dispute system is. DHS' response is also nonsensical because a verified error will not appear on a credit report because the Fair Credit Reporting Act requires it to be deleted.

Third, DHS failed to address the credit reporting system's specific impact on immigrants. Many immigrants will not have a credit history for USCIS to consider. Even when they do have credit histories, a Federal Reserve study has found that their credit scores are actually artificially low, another fact that DHS failed to address.

Fourth, DHS failed to adequately respond to comments raising concerns about racial disparities in credit reports and scores. Although DHS briefly acknowledged these comments, its short response lacked evidence or support, failing to address the numerous studies showing significant racial disparities in credit scores.

Because DHS ignored, disregarded, or failed to address these key concerns with using credit histories and scores in public charge determinations, the Public Charge Rule is arbitrary and capricious in violation of the APA.

ARGUMENT

DHS' issuance of the Public Charge Rule violates the APA. Under the APA, a reviewing court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious if the agency fails to consider an important aspect of the problem, fails to examine the relevant data, fails to give adequate reasons for its decisions, or offers no "rational

connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

Where, as here, an agency departs from a prior policy, it faces a higher burden. It must show that there are "good reasons" for the new policy and provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino Motorcars*, 136 S. Ct. at 2126 (citation and internal quotation marks omitted).

I. DHS failed to adequately respond to comments that credit reports and credit scores are inappropriate measures to determine public charge status.

In its Notice of Proposed Rulemaking ("NPRM"), DHS proposed using credit scores and credit reports to determine whether someone will become a public charge. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,291 (proposed Oct. 10, 2018). USCIS also proposed considering income, resources, non-cash assets, financial liabilities, private health insurance, and receipt of certain public benefits, as well as age, medical conditions, family status, and education and skills. *Id.* at 51,178. DHS received "266,077 comments" on the proposed rule, "the vast majority of which opposed the rule." 84 Fed. Reg. at

41,297. Nearly 400 submissions expressed serious concerns about the use of credit scores and reports in particular.[2]

Several commenters pointed out that the CFPB, the administrative agency with the deepest expertise and greatest regulatory authority over this issue, had explained that credit scores are specifically designed to measure one thing—the likelihood that a borrower will become 90 days late on a credit obligation. *See, e.g.*, *Comment submitted by Chi Chi Wu, National Consumer Law Center* at 1, Regulations.gov, USCIS-2010-0012-50351; *Comment submitted by Joanna Ain, Prosperity Now* at 2, Regulations.gov, USCIS-2010-0012-48637; *Comment submitted by Arianna Cook-Thajudeen, National Housing Law Project* at 16, Regulations.gov, USCIS-2010-0012-51491; *Comment submitted by Brittany Thomas, Center for Constitutional Rights, Human Rights in the U.S. Project of the Columbia Law School Human Rights Program* at 7, Regulations.gov, USCIS-2010-0012-47813; *Comment submitted by Andrea Luquetta, California Reinvestment Coalition* at 4, Regulations.gov, USCIS-2010-0012-52687; *see also* Consumer Financial Protection Bureau, *Data Point: Credit Invisibles* at 7

[2] A search conducted of the comments filed in this rulemaking available on regulations.gov using the terms "credit report," "credit history," and "credit score" found 388 unique comments mentioning those terms. For individual terms, the numbers are:

"credit report" – 67;

"credit history" – 304; and

"credit score" – 300.

(May 2015), https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf. Another commenter pointed DHS to materials, written by the credit scoring developer FICO, that explain that the credit score is a measure to evaluate a potential borrower's credit risk. *Comment submitted by Pamela Banks, Consumer Reports* at 2, Regulations.gov, USCIS-2010-0012-36677; *see also my*FICO, *Understanding FICO Scores* 4 (2016), https://www2.myfico.com/Downloads/Filed/myFICO_UYFS_Booklet.pdf.

In issuing the final Public Charge Rule, DHS failed to adequately address these comments and the many others that provided ample evidence that credit scores and reports are not designed, and even further are an inappropriate tool, for determining whether an immigrant is likely to become a public charge. Instead, DHS merely reiterated, with no support, that "a good credit score is a positive factor that indicates a person is likely to be self-sufficient and support the household" and, "conversely, a lower credit score or negative credit history . . . may indicate that a person's financial status is weak and that he or she may not be self sufficient." 84 Fed. Reg. at 41,425.

In stating that the "credit report and score are nonetheless sufficiently reliable to be useful in reviewing a person's financial status in determining whether an applicant is likely to become a public charge," DHS cited two authorities. 84 Fed. Reg. at 41,426 (citing *Marting Realty, Inc. v. Marks*, 1986 WL 4647 (Ohio Ct.

App. 9th Dist. 1986); Official Interpretation 43(c)(3)-3 to 12 CFR 1026.43(c)(3), published as part of Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6408, 6607 (2013)). What DHS fails to state, however, is that in both instances, credit reports were deemed reliable when being used for the purposes for which they were intended—determining whether to extend credit to a consumer. The Public Charge Rule does not use credit reports for their intended purposes.

As DHS provided no basis for its continued assertions regarding the relevance of credit scores and histories to a public charge determination and ignores evidence that commenters presented to the contrary, its action is arbitrary and capricious. *See State Farm*, 463 U.S. at 43 ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action").

In addition to comments regarding the intended purpose of credit scores, commenters pointed out that credit scores are a particularly inappropriate gauge of whether someone is likely to become a public charge because they are only partly based on the consumer's payment records. While 35 percent of a score is based on on-time payments, the rest of the score is based on factors such as having low balances on credit cards compared to the credit limit; how many years a consumer has had credit; and having a good "mix" of credit, including a mortgage. *National Consumer Law Center Comments* at 2 (citing *my*FICO, *Understanding FICO*

Scores 14 (2016), https://www2.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf); *California Reinvestment Coalition Comments* at 4. Thus, 65 percent of a credit score is based on factors that do not show financial distress or inability to pay bills. These factors also disfavor consumers who are new to credit, such as immigrants. Although several commenters pointed out how the composition of credit scoring models does not make them appropriate considerations in a public charge determination, DHS did not even mention these comments, much less respond to them in the Final Rule or the preamble. *See* 84 Fed. Reg. at 41,425–428.

DHS' pattern of failing to address issues raised by commenters is further shown by its statement in the preamble that credit reports include "lawsuits" and "arrests." 84 Fed. Reg. at 41,425–426. Commenters specifically pointed out that credit reports do not include arrest records and, moreover, that the credit bureaus have made changes that have removed the vast majority of lawsuit records from credit reports. *National Consumer Law Center Comments* at 3. DHS could have easily removed this reference to arrests and lawsuits. Yet DHS did not, indicating that DHS simply regurgitated the materials in its NPRM and failed to read or adequately consider the comments.

By ignoring or disregarding key concerns raised in the comments, DHS failed to engage in the "reasoned decisionmaking" that the APA requires.

Michigan v. E.P.A., 135 S. Ct. 2699, 2706 (2015) (APA requires an agency to engage in "reasoned decisionmaking" and to base its action "on a consideration of the relevant factors") (citation and internal quotation marks omitted).

II. DHS failed to adequately address the problem of high rates of inaccuracy in credit reports.

Credit reports suffer from high rates of inaccuracy. The FTC has found that about 21 percent of consumers had verified errors in their credit reports, 13 percent had errors that affected their credit scores, and 5 percent had serious errors that would cause them to be denied or pay more for credit. *See National Consumer Law Center Comments* at 3; *Comment submitted by Rachel Nadas, Consumer Law Clinic, Legal Aid Justice Center* at 2, Regulations.gov, USCIS-2010-0012-50441; *see also* Federal Trade Comm'n Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (Dec. 2012). One commenter noted that in their experience, "many recent immigrants are subjected to financial frauds, identity theft and financial abuse by strangers or by a family member or other person close to them." *Comment submitted by Roger Bertling, Consumer Protection Clinic of the Legal Services Center of Harvard Law School* at 2, Regulations.gov, USCIS-2010-0012-45722.

DHS' response to the high rate of error in credit reports was one sentence in the preamble (but not the actual rule) stating that USCIS would not consider any

error on a credit report, but only if the error has been verified by the credit bureau. 84 Fed. Reg. at 41,427. This one-sentence response is the *same exact language* that DHS included in the proposed rule. 83 Fed. Reg. at 51,189. This indicates that DHS improperly failed to consider or address any of the evidence in the record that specifically addressed the problem of high error rates in credit reports.

Moreover, DHS' one-sentence statement about credit reporting errors is inadequate for several reasons, most of which were specifically raised in the comments and ignored by DHS. *See, e.g., National Consumer Law Center Comments* at 3–4. First and most obviously, the response is nonsensical because if a credit bureau verifies an error, *it will not appear in a credit report because the Fair Credit Reporting Act requires it to be deleted*. *See* 15 U.S.C. § 1681i(a)(5)(A).

Second, credit bureaus are notorious for obstinately refusing to correct errors after repeated disputes by consumers, even in the face of clear evidence that information is inaccurate. *See National Consumer Law Center Comments* at 6; *Legal Aid Justice Center Comments* at 2–3; *Consumer Reports Comment*s at 3; *see generally* Chi Chi Wu, et al., National Consumer Law Center, Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports (2009), http://www.nclc.org/images/pdf/pr-reports/report-automated_injustice.pdf. Credit bureaus "often fail to effectively

address error complaints because of fundamental problems with the way they investigate disputes and the limited resources they devote to error resolution." *See Consumer Reports Comments* at 3.

Third, many immigrants face significant barriers in knowledge, language, and resources that prevent them from even submitting a dispute. They may not be aware of what a credit report is, the contents of their credit report, or how to access their report. *See Legal Services Center of Harvard Law School Comments* at 2. Credit reports are not available in languages other than English, posing another significant barrier to immigrants accessing them and, in cases where there is an error, filing a dispute with the credit bureaus. *See California Reinvestment Coalition Comments* at 5.

The serious problems with credit reporting that commenters raised—how a person would show that a credit bureau verified an error, the difficult process for getting errors resolved, and the difficulty many immigrants face in understanding the error resolution process—required DHS to do more than merely repeat the same sentence that appeared in the NPRM. The APA requires DHS to "reflect upon the information contained in the record and grapple with contrary evidence." *Fred Meyer Stores, Inc. v. Nat'l Labor Relations Bd.*, 865 F.3d 630, 638 (D.C. Cir. 2017); *see also Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 293 (4th Cir. 2018) (agency's lack of explanation "particularly troubling" given

contrary evidence in the record). DHS failed to do so. As a result, the Public Charge Rule is arbitrary and capricious.

III. DHS failed to adequately address the credit reporting system's specific impact on immigrants.

DHS stated in the preamble to the NPRM that the "absence of an established U.S. credit history would not *necessarily* be a negative factor when evaluating public charge in the totality of the circumstances." 83 Fed. Reg. at 51,189 (emphasis added). DHS further provided that USCIS "*may* give positive weight" to applicants who are able to show a lack of debt or a history of paying bills on time. *Id.* (emphasis added).

In response, commenters emphasized that immigrants likely have thin or even no credit histories and that DHS failed to provide clear criteria about how USCIS would consider that fact. *National Consumer Law Center Comments* at 3; *Legal Aid Justice Center Comments* at 3; *Center for Constitutional Rights Comments* at 7; *Comment submitted by Sharon Parrott, Center on Budget and Policy Priorities* at 33, Regulations.gov, USCIS-2010-0012-37272; *Comment submitted by Tobias Read, Oregon State Treasurer* at 2, Regulations.gov, USCIS-2010-0012-47866. Oregon State Treasurer Tobias Read commented that "the lack of specificity regarding how a credit invisible or credit unscorable would be treated is disconcerting." *Oregon State Treasurer Comments* at 2. Despite such

comments, the Final Rule does not clear up the confusion about how USCIS will consider the lack of credit score and histories.

Further, when immigrants within the United States do have credit histories, their credit scores are actually artificially low. *National Consumer Law Center Comments* at 3; *Legal Aid Justice Center Comments* at 3; *Center for Constitutional Rights Comments* at 7; *California Reinvestment Coalition Comments* at 5. A Federal Reserve study found immigrants' credit scores tend to be lower than what their actual repayment behavior on loans turns out to be, a fact that DHS failed to address. *See National Consumer Law Center Comments* at 3 (citing Bd. of Governors of the Fed. Reserve System, Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit at S-2 (Aug. 2007) ("Evidence also shows that recent immigrants have somewhat lower credit scores than would be implied by their performance.")).

In short, DHS' explanation supporting the Public Charge Rule failed to address and grapple with comments highlighting the specific issues faced by immigrants with respect to credit reporting and scoring, further evidence that it is arbitrary and capricious. *See Fred Meyer*, 865 F.3d at 638.

IV. DHS failed to adequately address the fact that there are significant racial disparities in credit scoring.

Credit reports and scores reflect stunning racial disparities. Multiple studies have found that African American and Latino communities have lower credit scores as a group than whites. Commenters stated this fact, and provided a list of these studies, to DHS. *See National Consumer Law Center Comments* at 4; *California Reinvestment Coalition Comments* at 6 (citing studies by the CFPB, FTC, Federal Reserve, and Brookings Institution); *see also Comment submitted by Dara Duguay, Credit Builders Alliance* at 3, Regulations.gov, USCIS-2010-0012-50258.

DHS briefly acknowledged that commenters had raised concerns about racial disparities in credit reports and scores. 84 Fed. Reg. at 41,427 ("Additionally, a few commenters stated that using an immigrant's credit history in public charge determinations would have a disproportionate impact on immigrants of color; women; survivors of sexual and domestic abuse; people with lower levels of education; and local communities where credit scores there are lower than the national average"). However, rather than grapple with the evidence before it, DHS offered only a fourteen-word response, devoid of evidence or support: "DHS disagrees that consideration of credit scores will disparately affect certain groups of aliens." *Id.* In summarily dismissing key concerns raised in the comments, DHS failed to offer an explanation "clear enough that its path may reasonably be

discerned." *Encino Motorcars*, 136 S. Ct. at 2125 (internal quotation marks and citation omitted). Because DHS failed "to provide even that minimal level of analysis, its action is arbitrary and capricious." *Id.*

CONCLUSION

As shown above, the final Public Charge Rule largely ignores commenters' concerns with using credit scores and credit histories in public charge determinations. Where DHS did acknowledge specific concerns, its responses were conclusory or contrary to the evidence. DHS' actions with regard to use of credit histories and scores in public charge determinations are an example of, and bolster, Plaintiffs-Appellees' argument that the final rule is arbitrary and capricious in violation of the APA.

Respectfully submitted,

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Dated: January 31, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Local Rules 29.1(c) and 32.1(a)(4)(A) because it contains 4,515 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Microsoft Word 2010 in Times New Roman 14-point font, a proportionally spaced typeface.

Dated: January 31, 2020

/s/ Stuart Rossman
Stuart Rossman

CERTIFICATE OF SERVICE

I certify that on January 31, 2020, I electronically filed the foregoing brief of *Amici Curiae* with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Stuart Rossman
Stuart Rossman