UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, CENTRAL AMERICAN REFUGEE CENTER NEW YORK, CATHOLIC CHARITIES COMMUNITY SERVICES (ARCHDIOCESE OF NEW YORK), CATHOLIC LEGAL IMMIGRATION NETWORK, INC., ALICIA DOE, BRENDA DOE, CARL DOE, DIANA DOE, and ERIC DOE,

Plaintiffs,

- against -

MICHAEL POMPEO, in his official capacity as Secretary of State; the UNITED STATES DEPARTMENT OF STATE; DONALD TRUMP, in his official capacity as President of the United States; ALEX AZAR, in his official capacity as Secretary of the Department of Health and Human Services; and the UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES,

Defendants.

No. 1:19-cv-11633-GBD

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

As part of the Trump Administration's radical restructuring of a broad array of immigration rules, Defendants seek to upend long-established law that allows the family members of U.S. citizens and lawful permanent residents to become lawful permanent residents themselves. For more than a century, U.S. immigration law, which bars admission and adjustment to those likely to become a "public charge," has defined the term narrowly, applying it only to individuals who depend primarily on the government for subsistence. But in a series of executive actions developed over the three years the Administration has been in power, federal agencies and the President himself have sought to exclude low-income immigrants of color from admission by revising and overriding the public charge statute absent Congressional authority.

Defendants have done so by taking the three executive actions at issue here: (1) revising the public charge guidelines in the Department of State's ("DOS") Foreign Affairs Manual ("FAM"), which sets policy for consular processing of intending immigrants seeking admission (the "FAM Revisions"); (2) publishing an Interim Final Rule that would replace the FAM Revisions, alter the public charge definition that applies during consular processing, and bar thousands more immigrants from admission ("the "IFR"); and (3) issuing a "Presidential Proclamation Suspending the Entry of Immigrants Who Will Financially Burden the Health Care System," which, together with implementing guidelines, would bar entry by tens of thousands of immigrant visa applicants and visa holders who do not have certain forms of health care coverage (the "Proclamation"). These dramatic changes to the family-based immigration system are referred to here as the "Consular Rules," and through this Motion Plaintiffs seek to enjoin them.

Plaintiffs are likely to prevail on their claims that the Consular Rules violate the Administrative Procedure Act ("APA") and the Immigration and Nationality Act ("INA"), and exceed the legal authority of the Defendants. The FAM Revisions and IFR overturn decades of judicial and

administrative interpretation of the statutory term "public charge." This Court has already concluded that a similar rule promulgated by the Department of Homeland Security ("DHS" and the "DHS Rule") contravenes the INA's definition of "public charge," and is contrary to law in violation of the APA. *Make the Road N.Y.* v. *Cuccinelli*, No. 19 Civ. 7993, 2019 WL 5484638, at *11 (S.D.N.Y. Oct. 11, 2019) ("*MRNY*"). The same is true here. Further, the FAM Revisions and the IFR are substantive regulations issued in blatant disregard of the APA's notice-and-comment requirements. They also are arbitrary and capricious, inviting discriminatory enforcement that bears disproportionately on immigrants of color who are *less likely* to use public benefits in the future. Finally, the FAM Revisions are impermissibly retroactive, penalizing immigrants for lawful receipt of government benefits *before* those revisions existed.

The Proclamation is similarly unprecedented, imposing a requirement that immigrants possess certain forms of "approved" health insurance and thus overriding the plain language of the INA's "public charge" provision, which requires an analysis of at minimum five factors. While the INA allows the President to suspend the entry of foreign nationals if he finds that their admission would be detrimental to the United States, the entirety of the Proclamation consists of domestic policy-making that far exceeds the authority delegated by statute. Indeed, as one district court has already concluded, "the President's Proclamation . . . is inconsistent with the INA . . . and independently, the Proclamation was not issued under any properly delegated authority." *Doe #1* v. *Trump*, No. 19 Civ. 1743, 2019 WL 6324560, at *1 (D. Or. Nov. 26, 2019). Further, as with the FAM Revisions and the IFR, DOS issued notices implementing the Proclamation without meaningful opportunity for public comment, violating the APA's rulemaking procedures.

Plaintiffs and countless others now suffer and will continue to suffer significant and irreparable harm. *First*, the Consular Rules will almost certainly result in the likely denial of visas of the named individual Plaintiffs, each of whom must travel back to their foreign consulate for an

immigration interview or sponsor a spouse who will have to do the same. Immigrants subject to the Consular Rules face a very serious threat of indefinite family separation if they are denied and barred from re-entering the United States. *Second*, out of fear that the Consular Rules will result in visa denials, one Plaintiff has even foregone public health benefits for which she is perfectly eligible, posing substantial risks to her health and well-being; others face being forced to buy expensive but non-comprehensive insurance plans in order to maintain family unity and the life they have worked hard to build in the United States. This harm is not limited to individual Plaintiffs here; as shown through expert analysis, thousands upon thousands of individuals are likely to forego public benefits or waste money on inadequate health care plans, resulting in direct and irreparable harm, in response to the Consular Rules. Organizational Plaintiffs will be forced to absorb that cost by providing legal advice regarding substitutes to the otherwise-available public services that these individuals forego, in some cases losing funds as a result. *Finally*, it is well-established that governmental actions that directly attack organizational entities' core missions and drain their resources—as the Consular Rules are doing to organizational Plaintiffs—irreparably harm those entities, as this Court previously found in connection with the DHS Rule.

The balance of hardships and public interest tilt heavily toward the Plaintiffs. Like the DHS Rule, the challenged Consular Rules will result in economic and public health harms that "are not speculative or insufficiently immediate" but in fact will "expose individuals to economic insecurity, health instability, denial of [a] path to citizenship and potential deportation." *MRNY*, 2019 WL 5484638, at *11. By contrast, no significant harm will befall Defendants by requiring them to apply the same standards in consular interviews that they have applied for more than 20 years, or by stopping them from applying a health coverage rule that has never existed.

For all the above reasons, Plaintiffs' motion to enjoin application of the FAM Revisions and implementation of the IFR and Proclamation should be granted.

FACTS

I. The History of the Term "Public Charge" in the Immigration and Nationality Act

During the more than 130 years since the term "public charge" first became part of U.S. law as part of the Immigration Act of 1882, it has been consistently interpreted and applied narrowly to refer *only* to persons who are institutionalized or are otherwise primarily dependent on the government for subsistence—an understanding that Congress has repeatedly approved.

A. The Meaning of "Public Charge" Has Consistently Referred to a Narrow Class of Persons Wholly Unable to Care for Themselves

The term "public charge" first appeared in federal immigration law in the Immigration Act of 1882, which provided that "any person unable to take care of himself or herself without becoming a public charge" could be denied admission. Ex. 23, 47th Cong. ch. 376, 22 Stat. 214.[1] Later statutes changed the wording of the clause to "likely to become a public charge"—the language of the current statute—and added provisions creating a public charge basis for removal as well as inadmissibility. The legislative history of the 1882 Act shows that Congress intended the term "public charge" to refer to those likely to become long-term residents of "poor-houses and alms-houses"—*i.e.*, persons who were institutionalized and wholly dependent on the state. Ex. 25, 13 Cong. Rec. 5109 (June 19, 1882) (statement of Rep. Davis). Judicial decisions of the time applied the public charge provision to those "likely to become occupants of almshouses for want of means with which to support themselves in the future." *Howe* v. *United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917); *see also In re O'Sullivan*, 31 F. 447, 449 (C.C.S.D.N.Y. 1887) ("[T]he ultimate fact … is whether these immigrants were 'unable to take care of themselves.'"). The provision was intended to exclude immigrants "on the ground of permanent personal objections" rather than a need for temporary assistance. *Gegiow* v. *Uhl*, 239 U.S. 3, 10 (1915).

[1] Citations to "Ex. __" throughout are to exhibits to the accompanying Declaration of Andrew J. Ehrlich.

The Board of Immigration Appeals ("BIA") left this meaning undisturbed through the twentieth century. *See Matter of B-*, 3 I. & N. Dec. 323, 324 (B.I.A. 1948) ("[A]cceptance by an alien of services provided by a State . . . to its residents, services for which no specific charge is made, does not in and of itself make the alien a public charge [for removal purposes]."); *Matter of T-*, 3 I. & N. Dec. 641, 644 (B.I.A. 1949); *Matter of A-*, 19 I. & N. Dec. 867, 867 (B.I.A. 1988); *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (B.I.A. 1962; A.G. 1964) ("[T[he [INA] requires more than a showing of a possibility that the alien will require public support."); *Matter of Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974) ("The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge.").

B. Congress Has Approved Administrative Interpretations by Refusing to Define Public Charge to Mean Any Receipt of Means-Tested Benefits.

Congress has approved these judicial and administrative interpretations, repeatedly reenacting the public charge provisions of the INA without material change even as Congress made an increasingly broad array of public benefits available to low-income people over the course of the twentieth century[2]—including, for many years, otherwise eligible noncitizens.[3]

Congress altered the "public charge" provision for the first time in 1996, but again chose not to redefine "public charge" or to alter its settled interpretation. The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), did nothing to overturn the settled meaning of the INA's public charge provisions. Ex. 32, Pub. L. 104-208, div. C, § 531, 110 Stat. 3009, 3674 (1996) (amending 8 U.S.C. § 1182). Instead, Congress affirmatively re-enacted the existing public charge

[2] The legislative history for the 1990 reenactment makes clear that Congress was aware of these administrative and judicial decisions. *See* Ex. 30, Staff of the H. Comm. on the Judiciary, 100th Cong., Grounds for Exclusion of Aliens Under the Immigration and Nationality Act: Historical Background and Analysis 121 (Comm. Print 1988) (noting that courts had associated likelihood of becoming a public charge with "destitution coupled with an inability to work.").

[3] Ex. 43, Medha D. Makhlouf, *The Public Charge Rule as Public Health Policy*, 16 Ind. Health L. Rev. 177, 185–89 (2019) ("Throughout most of the twentieth century, noncitizens were generally eligible for public aid.").

provision relating to admission and status adjustment, and did not purport to redefine the term. In fact, in the 1996 debate on IIRIRA, Congress specifically considered and rejected a proposal to label as a public charge anyone who received certain means-tested public benefits, including not only cash benefits but Medicaid and SNAP (then food stamps).[4] The provision was included in early versions of the bill, but ultimately rejected by the President and both chambers, and dropped as a condition of final passage. *See Hamdan* v. *Rumsfeld*, 548 U.S. 557, 579-80 (2006) ("Congress's rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation"); *I.N.S.* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language"); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975) (rejecting construction of statute that would implement substance of provision that Conference Committee rejected); *Thompson* v. *Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) ("Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral votes upon the text of a law and its presentment to the President.") (citations omitted). Ultimately, the statute amended the public charge admissibility provision only to codify the existing "totality of the circumstances" standard. Ex. 32, Pub. L. 104-208, div. C, § 531, 110 Stat. 3009, 3674 (1996) (amending 8 U.S.C. § 1182), § 1182(a)(4)(B)(i). Nor did the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), which passed Congress shortly before IIRIRA and restricted certain noncitizens' eligibility for certain federal benefits, Ex. 31, Pub. L. 104-193, § 403, 110 Stat. 2105, 2265–67 (1996),

[4] *See* Ex. 35, Immigration Control & Financial Responsibility Act of 1996, H.R. 2202, 104th Cong. § 202 (1996); *see generally* Compl. ¶¶ 166-74. The express purpose of this proposed provision was to overturn the settled understanding of "public charge." When the Senate considered the bill, Senator Alan Simpson (a proponent of the provision) explained during debate that the purpose of the new public charge definition was to override "a 1948 decision by an administrative law judge"—*Matter of B-*. *See* Ex. 36, 142 Cong. Rec. S4401, S4408–09 (1996).

alter the public charge definition.[5] Had Congress wanted to change settled interpretations of public charge to include receipt of minimal amounts of noncash benefits, it could have done so as part of PRWORA, but it declined to do so both in 1996[6] and later when it passed legislation restoring or expanding access to federally-funded benefits for many immigrants.[7]

Administrative field guidance from 1999 confirmed this settled interpretation of public charge. On March 26, 1999, three years after the passage of PRWORA and IIRIRA, the Immigration and Naturalization Service ("INS," the predecessor agency to the U.S. Citizenship and Immigration Services ("USCIS") and U.S. Immigration and Customs Enforcement) issued its *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds* ("Field Guidance"), Ex. 40, 64 Fed. Reg. 28,689. Two months later, the INS issued a parallel proposed regulation. Ex. 41, Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676 (May 26, 1999). INS explained that the Field Guidance "summarize[d] longstanding law with respect to public charge," and provided "new guidance on public charge determinations" in light of the recent legislation. Ex. 40, at 28,689; *see also id.* at 28,692 ("The proposed standards take into account the law and public policy decisions

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[5] IIRIRA also expressly provided that public charge determinations may "consider any affidavit of support." 8 U.S.C. § 1182(a)(4)(b)(ii). In practice, since the enactment of IIRIRA, a noncitizen seeking admission or adjustment has been able to overcome a potential public charge finding by obtaining a sufficient affidavit of support from a sponsor. *See* Ex. 33, Center on Budget and Policy Priorities, Comment on DHS Rule, at 30 (Dec. 7, 2018) (hereinafter "CBPP DHS Comment").

[6] Congress's decision not to alter the settled administrative definition of "public charge" was not an oversight. On the contrary, PRWORA specifically amended *another* provision of the INA relevant to public charge determinations. Section 423 of PRWORA amended the INA to provide detail about the requirements for an affidavit of support, a document executed by sponsors of certain immigrants establishing that the immigrant will not become a public charge. Ex. 31, Pub. L. No. 104-193, § 423, 110 Stat. 2105, 2271–74.

[7] In legislation following enactment of PRWORA, Congress *expanded* the availability of certain benefits, particularly SNAP and Medicaid, to qualified immigrants. *See* Agricultural Research, Education and Extension Act of 1998 (AREERA), Pub. L. No. 105-185 (1998) (restoring eligibility for certain elderly, disabled, and child immigrants who resided in the United States when PRWORA was enacted); Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171 (2002) (restoring eligibility for food stamps (now SNAP) to qualified immigrant adults who have been in the United States at least five years, and immigrants receiving certain disability payments and for children, regardless of how long they have been in the country); Children's Health Insurance Reauthorization Act of 2009 (CHIPRA), Pub. L. No. 111-3 (2009) (providing states an option to cover lawfully present immigrant children and pregnant women under the federal Medicaid and Children's Health Insurance Program (CHIP) programs).

concerning alien eligibility for public benefits and public health considerations, as well as past practice by the Service and the Department of State.").

The Field Guidance reaffirmed the agency's longstanding approach by defining "public charge" as a noncitizen "who is likely to become (for admission/adjustment purposes) 'primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.'" *Id.* at 28,689. The Field Guidance also excluded from consideration in public charge determinations past or expected future receipt of noncash benefits such as Medicaid, SNAP, and housing assistance, because they "are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or family." *Id.* at 28,692. This guidance remained in effect for more than 20 years, during which period Congress did not revise the public charge definition, and in fact rejected an effort to do so.[8]

II. The Consular Rules' Override of the Public Charge Provision

Defendants planned to revise the "public charge" definition from the outset of Defendant Trump's term. On January 25, 2017, less than a week after inauguration, a draft of an executive order targeting immigrant-headed families that had used any means-tested public benefit, including children's health insurance for U.S. citizen children, was leaked to the public. The draft directed DHS to issue new rules defining "public charge" for immigration purposes to include any person receiving means-tested public benefits and ordered similar amendments of the FAM.[9]

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[8] During deliberations on the proposed Border Security, Economic Opportunity, and Immigration Modernization Act, a bill that sought to create a path to citizenship for noncitizens who could show they were "not likely to become a 'public charge,'" Senator Jefferson B. Sessions sought to amend the definition of public charge to include receipt of "non-cash employment supports such as Medicaid, the SNAP program, or the Children's Health Insurance Program." Ex. 39, S. Rep. No. 113-40, at 38, 42, 62 (2013). This amendment was rejected by voice vote. *Id.*

[9] *See* Ex. 49, Executive Order on Protecting Taxpayer Resources by Ensuring Our Immigration Laws Promote Accountability and Responsibility (Jan. 23, 2017).

Although the draft executive order was never signed, DHS began drafting a new rule to implement these same policies, and issued a proposed rule for notice-and-comment on October 10, 2018, providing the public with 60 days to submit comments. More than 266,000 comments, including comments by scholars, public policy groups, health care providers, advocacy groups, legal services organizations, other non-profits, states, counties, municipalities, and individuals were submitted in response to the DHS Rule, the "vast majority" of which, as DHS conceded, opposed the rule. Ex. 5, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,304 (Aug. 14, 2019). The final DHS Rule, largely disregarding these comments, was published in the Federal Register on August 14, 2019 (the "DHS Rule"), was enjoined by this Court (and, later, by other courts) just days before it was set to take effect on October 15, 2019. *MRNY*, 2019 WL 5484638 at *11. But while DHS undertook formal notice-and-comment processes, Defendants here disregarded those procedures entirely.

A. DOS' Revisions of the FAM Without Notice-and-Comment Rulemaking

Since 1999, consistent with the Field Guidance, the FAM has defined "public charge" as a non-citizen who "is likely to become primarily dependent on the U.S. Government for subsistence" either from "[r]eceipt of public cash assistance for income maintenance" or "[i]nstitutionalization for long-term care." Ex. 1, [Pre-2018] 9 FAM § 302.8-2(B)(1). Until 2018, the FAM *prohibited* consular officers from considering past, current, or future use of non-cash benefits, and provided a non-exclusive list of non-cash benefits programs *not* to be considered, including SNAP, Medicaid, Child Health Insurance Program (CHIP), and other assistance programs. *See id.* The FAM directed officers to consider "[a] properly filed, non-fraudulent Form I-864 [Affidavit of Support] in those cases where it is required, . . . sufficient to meet the [8 U.S.C. § 1182](a)(4) requirements [under the INA] and satisfy the totality of the circumstances analysis." *Id.*, § 302.8-2(B)(3).

On January 3, 2018, DOS revised the FAM, though not the definition of "public charge" itself, without any notice, opportunity for comment, or invocation of any exception to the APA's notice-and-comment requirements. The revisions directed consular officers to look for any "[p]ast or current receipt of public assistance of *any* type by the visa applicant or a family member in the visa applicant's household," including non-cash benefit programs, as evidence that the applicant will likely become a "public charge" in the future. Ex. 2, [Post-2018] 9 FAM 302.8-2(B)(2) (emphasis added). The revisions also drastically reduced the weight given to an affidavit of support, specifying that it would be a "positive" rather than *dispositive* factor in the determination. *Id*.[10]

The publication of the FAM Revisions had a dramatic effect on DOS findings of inadmissibility by radically increasing the number of initial denials. While DOS findings of inadmissibility on public charge grounds totaled only 1,033 in fiscal year 2016, an eye-popping 12,973 initial public charge denials were issued in fiscal year 2018—a *twelve-fold* increase. The highest increases in denials fell on Mexican applicants. Just seven Mexican nationals were denied admission on public charge grounds in fiscal year 2016, but 5,343 Mexican nationals received initial denials on public charge grounds in the first ten months of fiscal year 2019.[11] Intending immigrants from India, Pakistan, Bangladesh, Haiti, and the Dominican Republic also saw notable increases in initial findings of inadmissibility based on public charge grounds.[12] In contrast, there was no statistically significant increase in visa denials for applicants from predominantly white countries, where denials increased by just a few individuals.

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[10] Changes from the pre-2018 FAM and the post-2018 FAM are illustrated in a demonstrative. *See* Ex. 3.

[11] *See* Ex. 47, DOS tables linked to in Ted Hesson, *Visa denials to poor Mexicans skyrocket under Trump's State Department*, Politico (Aug. 6, 2019).

[12] For instance, public charge denials for Pakistani nationals increased from two denials in fiscal year 2016 to 563 in the first ten months of 2019. Public charge denials for Bangladeshi nationals increased from 324 denials in fiscal year 2017 to 1,262 in just the first ten months of fiscal year 2019. *Id*.

B. DOS' Release of the IFR Without Notice-and-Comment Rulemaking

On October 11, 2019—more than 16 months after the FAM Revisions, more than one year after DHS published notice of the proposed DHS Rule, and the same day that three of five federal courts considering the DHS Rule enjoined it—DOS published its IFR, which largely mirrors the DHS Rule. Ex. 4, Visa: Ineligibility Based on Public Charge Grounds, 84 Fed. Reg. 54,996. DOS did so on an emergency basis, just *four days* before the IFR was to take effect on October 15, 2019, and invoking "good cause" to avoid the APA's notice and public requirements. *Id.* at 55,011. DOS claimed that emergency implementation was necessary to ensure that consular officers made public charge determinations in the same way as DHS officials, who would be operating under the DHS Rule. *Id*. But with the injunction of the DHS Rule, no emergency existed. Two weeks later, DOS announced that it would be seeking notice and comment on a form necessary for implementing the IFR. Public Charge Questionnaire, 84 Fed. Reg. 57,142 (Oct. 24, 2019). Although DOS did not state that it had postponed the effective date of the IFR, it appears that it is not currently in effect.

The IFR, like the DHS Rule, defines "public charge" to mean a person likely to receive one or more specified "public benefits" in any amount for more than 12 months in any 36-month period. 22 C.F.R. § 40.41(b) (2019). The IFR defines "public benefit" to include cash benefits – which have long been part of the public charge inquiry – and, for the first time, also includes benefits from specified noncash programs that offer short-term or supplemental support, including SNAP, federal Medicaid (with certain exclusions), Section 8 Housing Assistance, Section 8 Project-Based Rental Assistance, and Public Housing. *Id.*, § 40.41(c) (as revised). As the Field Guidance explained, these benefits have been "made available to families with incomes far above the poverty level." Ex. 40, 64 Fed. Reg. at 28,692. *See also* Ex. 9, Declaration of Leighton Ku ("Ku Declaration"), Ex. B, ¶18 (describing range of income caps for federal Medicaid eligibility around the country); *id*., ¶ 80 (describing a study finding that people who received Medicaid had equivalent employment rates and

earnings levels as those who did not); Compl. ¶¶ 115–26. Crucially, the IFR counts receipt of two public benefits in one month as two months for purposes of the 12/36 scheme; receipt of three benefits counts as three months, and so on. 22 C.F.R. § 40.41(b). This stacking scheme labels as a "public charge" an intending immigrant who might in the future seek nutritional, housing, and Medicaid assistance to address a job loss or illness for as little as four months.

The IFR creates a complex and confusing scheme of positive and negative "factors," including certain "heavily weighted" factors, for USCIS personnel to use in determining whether someone is likely to become a public charge, identical to the factors used in the DHS Rule. *Id.*, § 40.41(a)(8). These factors focus significantly on the applicant's income and financial resources. For example, the IFR treats each of the following as a separate negative factor: income less than 125 percent of the federal poverty guidelines; past or current receipt of public benefits (a "heavily weighted" negative factor); a medical condition requiring extensive medical treatment; or lack of private health insurance (another "heavily weighted" negative factor). *Id*. Large family size, past requests for a fee waiver, lack of English language proficiency – a term that is dangerously undefined – and age under 18 or over 62 are also negative factors. *Id*., § 40.41(a).

Compared to the 1999 Field Guidance, the IFR would drastically increase the number of people deemed a public charge by consular officers. Plaintiffs' expert Danilo Trisi estimates that 81 percent of the world's population would be unable to meet the 125 percent of the Federal Poverty Guideline income threshold contained within the IFR. *See* Ex. 12, Declaration of Danilo Trisi ("Trisi Decl."), ¶¶ 18–21 (test not met by 99 percent of the population of South Asia; 99 percent of the population of Sub-Saharan Africa; and 79 percent of the population of Latin America and the Caribbean). Looking at the nearly identical DHS Rule, the Kaiser Family Foundation found that 94 percent of noncitizens who entered the United States without status have at least one characteristic that could be weighed negatively in a public charge determination, and 42 percent have characteristics

that could be treated as heavily weighted negative factors.[13] Trisi also finds that up to 50 percent of U.S.-born individuals used the benefits targeted by the IFR between 1997 and 2017 and that fifteen percent of U.S. workers 21 or older participate in those programs. *Id*., ¶¶ 10, 27–28, 39–43. By contrast, just one percent of U.S. workers meet the *current* benefit-related criteria in the public charge determination. *Id*., ¶ 26. The IFR would have a disproportionate impact on immigrants of color, particularly on Black and Latino applicants, even when, as analysis of census data shows, they are less likely than others to receive benefits once they become eligible. Ex. 10, Declaration of Jennifer Van Hook ("Van Hook Decl."), ¶¶ 11, 24, 26, 48.

C. The Health Care Proclamation Suspending Entry to Immigrant Visa-Holders Without Private Health Care Coverage

On October 4, 2019, while awaiting decisions regarding several emergency challenges to the DHS Rule, including one from this Court, President Trump issued the "Presidential Proclamation on the Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System." Ex. 6, 84 Fed. Reg. 53,991 (Oct. 9, 2019). The Proclamation, which purports to draw its authority from a provision of the INA that permits the President to "suspend" or "impose restrictions" on the entry of foreign-born persons if he "finds" such entry to be "detrimental to the interests of the United States," 8 U.S.C. § 1182(f), effectively denies entry to noncitizens with immigrant visas who cannot demonstrate either that they have the ability to purchase private health insurance shortly after entry or that they have assets to cover a foreseeable medical cost. Ex. 6, 84 Fed. Reg. at 53,991–93. The Proclamation thus renders one factor from the public charge provision – financial resources for health care costs – dispositive, overriding statutory requirements that officers consider "at a minimum" five separate factors and an affidavit of support. 8 U.S.C. § 1182(a)(4)(B).

[13] Ex. 28, Samantha Artiga et al., *Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid* (Oct. 2018). The CBPP DHS Comment cited this study by name and stated that it "should be consulted and discussed, rather than ignored" by DHS. Ex. 44, CBPP DHS Comment at 93.

Contending that "[h]ealthcare providers and taxpayers bear substantial costs" from "people who lack health insurance or the ability to pay for their healthcare," and asserting that the "Government is making the problem worse by admitting thousands of aliens who have not demonstrated any ability to pay for their healthcare costs," the Proclamation declares that the entry of such immigrants is "detrimental to the interests of the United States." Ex. 6, 84 Fed. Reg. at 53,991. The Proclamation provides no support for these assertions. *See id*. With limited exceptions,[14] otherwise-admissible immigrants, including those not excluded on public charge grounds, must be excluded unless they can show either (1) they would be "covered by appropriate health insurance" within 30 days of entry, or (2) they "possess[] the financial resources to pay for reasonably foreseeable medical costs." *Id*. at 53,991–92.

In order to be covered by "appropriate health insurance," an immigrant must possess one of several forms of "approved health insurance" detailed in the Proclamation: (1) an employer-sponsored plan; (2) an "unsubsidized health plan offered in the individual market within a State"; (3) "a short-term limited duration health policy effective for a minimum of 364 days" ["STLDI plan"]; (4) "a catastrophic plan"; (5) "a family member's plan"; (6) a healthcare plan made available to the U.S. military under 10 U.S.C. Chapter 55, including the TRICARE program; (7) "a visitor health insurance plan that provides adequate coverage for medical care for a minimum of 364 days"; (8) Medicare; or (9) "any other health plan that provides adequate coverage for medical care as determined by the Secretary of Health and Human Services." *Id*. at 53,993. But the eight specified types of approved health insurance listed in the Proclamation "are legally or practically unavailable

[14] The Proclamation exempts: (1) immigrants "holding a valid immigrant visa issued before the effective date" of the Proclamation; (2) immigrants holding certain less-common categories of visas; (3) unaccompanied immigrants under the age of 18; (4) immigrants "whose entry would further important United States law enforcement objectives, as determined by the Secretary of State"; and (5) immigrants "whose entry would be in the national interest, as determined by the Secretary of State." Ex. 6, 84 Fed. Reg. at 53,992–93. The latter two exceptions are not defined or explained. Notably, the Proclamation does not exempt VAWA self-petitioners, U-visa holders, or their family members, even though they are not subject to public charge determinations. 8 U.S.C. § 1182 (a)(4)(E).

to many immigrants, including most immigrants seeking family-based visas." *Doe #1* v. *Trump*, No. 19 Civ. 1743, 2019 WL 5685204, at *3 (D. Or. Nov. 2, 2019); *see also* Ex. 11, Declaration of Dania Palanker ("Palanker Decl."), Ex. A, ¶¶ 11–22 (describing lack of availability of plans listed in Proclamation); Ex. 13, Declaration of Lisa Sbrana ("Sbrana Decl."), ¶¶ 7–9. If an immigrant is unable to satisfy the "approved health insurance" portion of the Proclamation, the immigrant must demonstrate that they possess the "financial resources to pay for reasonably foreseeable medical costs." Ex. 6, 84 Fed. Reg. at 53,992. The Proclamation provides *no* standards to guide the determination of whether an immigrant possesses such financial resources.

The Proclamation was set to go into effect on November 3, 2019 and was issued without any accompanying guidelines. About two weeks before the effective date, the State Department issued an implementing announcement on its website that outlined new obligations under the Proclamation but also stated how consular officers would process and consider visa applications under the Proclamation, cautioning prospective immigrants that an "inability" to meet the Proclamation's requirements at the time of the interview "will result in the denial of the visa application." Ex. 8. Thereafter, on October 30, 2019, Defendant DOS published a "Notice of Information Collection" for "Emergency Review" ("the Emergency Notice") which sought to "establish standards and procedures for governing" determinations under the Proclamation. Ex. 7, 84 Fed. Reg. 58,199. The two-page notice consisted of instructions to consular officers to have immigrant visa holders "identify the specific health insurance plan, the date coverage will begin, and such other information related to the insurance plan as the consular officer deems necessary." *Id*. at 58,199–200. While entry is not suspended for those who "do not have coverage, but possess financial resources to pay for reasonably foreseeable medical expenses," the notice provides no guidance as to what are adequate financial resources, and defines "foreseeable medical expenses" in vague terms: expenses "related to existing medical conditions, relating to health issues existing at the time of visa adjudication." *Id*. at 58,200.

DOS sought public comment on the Emergency Notice by October 31, 2019, less than 48 hours after it was published, and only three days before it was to go into effect. Neither the announcement nor the Emergency Notice invoked any exception to the APA's notice and comment requirements. Further, DOS prepared changes to the FAM to implement the Proclamation. Ex. 56, Administrative Record from *Doe #1 v. Trump* (D. Or. Jan. 8, 2020) ("Admin. Rec.") at 29–37. It approved these changes without notice and comment rulemaking.

If the Proclamation is allowed to go into effect, nearly 65 percent of visa applicants, mainly applicants who are beneficiaries of family-based petitions, would lack qualified insurance. Ex. 9, Ku Decl., Ex. C, ¶ 21 (adopting percentage from October 2019 study by the Migration Policy Institute). Latino and Black immigrants would make a disproportionate number of those at risk of being deemed inadmissible for lack of private health insurance. *See* Ex. 10, Van Hook Decl., ¶ 75.

Finding that the Proclamation conflicted with the INA, the United States District Court for the District of Oregon blocked implementation with a temporary restraining order. *Doe #1*, 2019 WL 5685204 at *1. A preliminary injunction followed. *See Doe #1*, 2019 WL 6324560 at *1.

III. Plaintiffs

Plaintiffs will be immediately and irreparably harmed if the Consular Rules are not enjoined. Individual Plaintiffs face serious risk of family separation and many have foregone available benefits. Plaintiff Brenda Doe is an intending immigrant from the Dominican Republic who lives with her U.S. citizen husband and their three children, and who is eligible for State-funded Medicaid but did not apply for fear of the Consular Rules. Ex. 14, Declaration of Brenda Doe ("Brenda Doe Decl."), ¶¶ 2, 3, 16, 17. Plaintiff Carl Doe is an intending immigrant and a member of Plaintiff Make the Road New York ("MRNY") who lives with his U.S. citizen wife, who depends on him for financial and emotional support, and his adult stepdaughter. Carl speaks English and owns his own business. Ex. 15, Declaration of Carl Doe ("Carl Doe Decl."), ¶¶ 1, 3–7, 11. Plaintiff Diana Doe is an intending

immigrant and a member of MRNY who lives in the home she owns with her U.S. citizen husband and their U.S. citizen daughter, but who will have to leave the country to seek her immigrant visa at a U.S. consulate abroad. Ex. 16, Declaration of Diana Doe ("Diana Doe Decl."), ¶¶ 6–9. Plaintiff Eric Doe is a U.S. citizen who resides with his wife, an intending immigrant from Mexico, and three of their children. He has a chronic form of leukemia requiring ongoing treatment. Ex. 17, Declaration of Eric Doe ("Eric Doe Decl."), ¶¶ 1, 2, 6, 7, 11.

All of the organizational Plaintiffs are nonprofit organizations that aid immigrants through a variety of services, including health, housing, legal and advocacy services. *See generally* Exs. 18, 19, 20, 21, 22. As a result of the Consular Rules, each have either already suffered, or are in immediate danger of suffering, irreparable harm through the substantial diversion of the organizations' resources and frustration of their missions. Further, organizational Plaintiffs, all of whom submitted detailed public comments on the DHS Rule, were deprived of the opportunity to submit comments to the FAM Revisions at all and to submit comments on the IFR prior to its publication. *See* Ex. 18, Declaration of Theo Oshiro ("Oshiro Decl."), ¶ 25; Ex. 19, Declaration of Kim Nichols ("Nichols Decl."), ¶ 10–11; Ex. 20, Declaration of Elise de Castillo ("de Castillo Decl."), ¶ 5; Ex. 21, Declaration of C. Mario Russell ("Russell Decl."), ¶ 16, Ex. 22, Declaration of Charles Wheeler ("Wheeler Decl."), ¶ 11. With respect to the Emergency Notice, MRNY and ASC signed onto a public comment submitted by Protecting Immigrant Families, but only CLINIC was able to submit comments in the 2-day window provided by DOS. Ex. 22, Wheeler Decl., Ex. D.

ARGUMENT

Rule 65 of the Federal Rules of Civil Procedure authorizes a court to issue a preliminary injunction where a plaintiff demonstrates that: (i) she is likely to prevail on the merits; (ii) she is likely to suffer irreparable harm in the absence of such relief; (iii) the balance of equities is in her favor; and (iv) an injunction is in the public interest. *Winter* v. *Nat. Res. Def. Counsel*, 555 U.S. 7, 20 (2008).

This same test applies to a motion seeking a stay of agency action under 5 U.S.C. § 705. *MRNY*, 2019 WL 5484638 at *13 n.4 (citing *Nat. Res. Def. Council* v. *U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 149 (S.D.N.Y. 2019)). Under these standards, the Consular Rules should be preliminarily enjoined or their effective dates postponed nationwide.

I. Plaintiffs Are Likely to Succeed on Their APA and Ultra Vires Claims

Plaintiffs are likely to prevail on their claims. *First*, the FAM Revisions and IFR are: inconsistent with the meaning of "public charge" in the INA and thus contrary to law; blatantly violate notice-and-comment requirements of the APA; are arbitrary and capricious; and, in the case of the FAM Revisions, require evaluation of past receipt of benefits and thus are impermissibly retroactive. *Second*, the Proclamation conflicts with the INA and exceeds the scope of executive authority authorized by Congress under 8 U.S.C. § 1182(f), and the DOS' website announcement and Emergency Notice violate the APA.

A. The FAM Revisions and IFR Are Contrary to the INA

The FAM Revisions and IFR are contrary to INA's Section 1182(a)(4). Repeated legislative enactments did not overturn longstanding precedent defining a "public charge" as someone primarily dependent on the public for subsistence. *See supra* pp. 4–8. But both the FAM Revisions and the IFR use receipt of minimal public benefits to deem an intending immigrant a public charge.

While the 2018 FAM Revisions maintain the historical understanding of public charge as "primarily dependent on the U.S. government (Federal, state, local) for subsistence[]," Ex. 2, 9 FAM 302.8-2(B)(1)(A), they nonetheless require consular officers to evaluate the receipt, at any time in the past, of "public assistance of any type" by the intending immigrant and *"any family member in her household*." *Id*., 302.8-2(B)(2)(f) (emphasis added). Thus, a mother whose disabled U.S. citizen child has accessed Medicaid and SNAP runs the risk of being deemed a public charge even if she herself

has not relied on government support for subsistence. *Id*. The use of this information goes far beyond the historical understanding of public charge determinations.

In many ways the IFR goes even further. Nearly identical to the DHS Rule, the IFR redefines as a "public charge" any noncitizen who receives one or more public benefits for 12 months in the aggregate within any 36-month period. *See supra* p. 11; *see also* 22 C.F.R. § 40.41(b) (as revised). "Public benefits" are defined to include not only cash assistance but also noncash benefits such as SNAP, Medicaid, and federal housing assistance. 22 C.F.R. § 40.41(c). In terms of quantity or value of the benefits there is no minimum threshold; *any* actual or predicted amount of receipt, is sufficient. *Id*. The IFR creates a confusing new framework for evaluating whether noncitizens are likely at any time to become a public charge, with various factors given different levels of "positive" and "negative" weight. *Compare* Ex. 5, 84 Fed. Reg. at 41,397, *with* 22 C.F.R. § 40.41(a)(8). DOS expressly acknowledges the overlap with the DHS Rule: its justification for the abbreviated notice and lack of pre-publication comment period was the purported need for consistency with the DHS Rule. Ex. 4, 84 Fed. Reg. at 55,011.

As this Court found in enjoining the DHS Rule, Defendants' redefinition "has absolutely no support in the history of U.S. immigration law." *MRNY*, 2019 WL 5484638, at *9. Indeed, "[u]pon review of the plain language of the INA, the history and common-law meaning of 'public charge,' agency interpretation, and Congress's repeated reenactment of the INA's public charge provision without material change, one things is abundantly clear—'public charge' has *never* been understood to mean receipt of 12 months of benefits within a 36-month period." *Id*. at *7 (emphasis in original). Rather, as the district court in the Northern District of Illinois concluded in blocking the DHS Rule, more than a hundred years of precedent establishes that "'public charge' encompasses only persons who . . . would be substantially, if not entirely, dependent on government assistance on a long-term basis." *Cook Cty.* v. *McAleenan*, No. 19 Civ. 6334, 2019 WL 5110267 at *9 (N.D. Ill. Oct. 14, 2019),

citing *Gegiow* v. *Uhl*, 239 U.S. 3 (1915).[15] Importantly, "against that statutory and case law backdrop, Congress retained the 'public charge' language in the INA of 1952 and the IIRIRA of 1996." *Id*. at *12. There is no basis to reach any contrary conclusions as to Defendants' efforts to reshape the immigration system through the FAM Revisions or the IFR.

B. Defendants' Issuance of the FAM Revisions and the IFR Violated the Procedural Requirements of the APA

The APA provides for judicial review of "final agency action," 5 U.S.C. § 704, and, subject to limited exceptions, requires that agencies abide by certain procedures in making final agency action. 5 U.S.C. § 553(a)-(c). Before promulgating a substantive rule, an agency must publish "[g]eneral notice of proposed rulemaking" and provide "an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id*. Agencies may not evade these requirements absent "good cause" that comment proceedings are "impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(3)(B). Similarly, publication of rules "shall be made not less than 30 days before its effective date" unless the rules "relieve a restriction," are merely an

[15] The injunctions were appealed by the defendants in that case, and the parties are briefing the appeal for the Second Circuit. The Second Circuit denied the defendants' request for stay of the injunction pending appeal on January 8. *See MRNY* v. *Cuccinelli & State of New York* v. *Dep't of Homeland Sec.*, 2020 WL 95815 (2d Cir. 2020). On January 13, 2019, the defendants appealed that decision to the U.S. Supreme Court. The defendants rely heavily on the 2-1 decision by a Ninth Circuit panel granting a stay of the injunction issued by the District of Washington and the Northern District of California, *City & Cty. Of San Francisco* v. *USCIS*, 944 F.3d 773, 807 (9th Cir. 2019) (*Stay Op.*). But the Ninth Circuit motions panel erred in multiple ways. It improperly disregarded the district court's extensive factual findings detailing the irreparable harm that the plaintiff states would suffer if the DHS Rule were to take effect, and ignored entirely the harm the DHS Rule would cause to the general public, including grave harm to public health. *See id.* at 806-07; *id.* at 809-10 (Owens, J., concurring in part and dissenting in part). At the same time, it gave undue weight to defendants' unsupported allegations that the government would be irreparably injured merely from maintaining the status quo. *See id.* at 805-07; *id* at 809-10 (Owens, J., concurring in part and dissenting in part). On the merits, the panel's conclusion that the historical interpretation of "public charge" has varied substantially relied largely on a misreading of the seminal agency decision in *Matter of B-*, discussed *supra* pp. 5–6 & note 4. The motions panel also improperly disregarded Congress's repeated consideration and rejection of statutory provisions that would have redefined "public charge" along the lines now proposed in the DHS Rule. *See supra* pp. 5–8. The Ninth Circuit is currently considering a petition for rehearing *en banc* of the motion panel's two-to-one decision, which is fully briefed. Two other Courts of Appeal – including this Circuit – have declined to follow the Ninth Circuit and denied substantially identical motions to stay injunctions of the DHS Rule. *See New York* v. *U.S. Dep't of Homeland Sec.*, 2020 WL 95815, at *1 (2d Cir. Jan. 8, 2020); *Cook Cty.* v. *Wolf*, No. 19-3169 (7th Cir. Dec. 23, 2019). Finally, the Fourth Circuit issued a stay without an opinion. *Casa de Maryland, Inc. v. Trump*, No. 19-2222, Dkt. No. 21 (Dec. 9, 2019) (unpublished order).

"interpretive rule or statements of policy"; or the agency makes a finding of "good cause." *Id.* § 553(d)(1)-(3). Notice and comment mandates "are not mere formalities" and "serve the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations." *Nat. Resources Defense Council* v. *Nat'l. Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018). Although the FAM Revisions and IFR are final agency actions, *see Scenic Am., Inc.* v. *United States Dep't of Trans.*, 836 F.3d 42, 55–56 (D.C. Cir. 2016), the rulemaking process for each failed to comply with the APA (in contrast to the process followed for the enjoined DHS Rule), and they must be set aside pursuant to Section 706(2)(D). *Mack Trucks, Inc.* v. *EPA*, 682 F.3d 87, 95–96 (D.C. Cir. 2012) (vacating interim rule where agency did not comply with APA's notice and comment requirements).

1. The FAM Revisions Did Not Adhere to Notice and Comment Requirements

"Substantive rules independently have the force of law, but interpretative rules can only clarify existing law." *U.S.* v. *Lott*, 750 F.3d 214, 217 (2d Cir. 2018). While interpretive rules need not be subject to notice-and-comment procedures, *see* 5 U.S.C. § 553(b)(3)(A), "substantive" or "legislative rules" "must comply with the notice and comment provisions," *Sweet* v. *Sheahan*, 235 F.3d 80, 90–91 (2d Cir. 2000). "Substantive" or "legislative'" rules are "those that create new law, right[s], or duties, in what amounts to a legislative act." *N.Y. State Elec. & Gas Corp.* v. *Saranac Power Partners, L.P.*, 267 F.3d 128, 131 (2d Cir. 2001) (internal quotations omitted).

The FAM Revisions are plainly substantive. They "alter the visa application regime by eliminating, in effect, a safe harbor once extended to the receipt of non-cash benefits." *Mayor and City Council of Baltimore*, No. 18 Civ. 3636, 2019 WL 4598011, at *27 (D. Md. Sep. 20, 2019) ("*City of Baltimore*"). That safe harbor also "barred consular officers from denying a visa application on public charge grounds due to the current or past use of non-cash public assistance by the applicant's family." *Id*. Under the FAM Revisions, "consular officers should consider the past and future use of

non-cash benefits by the applicant as 'part of the totality of the applicant's circumstances in determining whether an applicant is likely to become a public charge.'" *Id.* And the FAM now requires consideration of non-cash assistance by the applicant's family "and dictates that this is a 'heavily negative factor' in the analysis." *Id.*

The FAM Revisions "present the 'authoritative' position of the State Department on the public charge rule; they alter a legal regime; and they eliminate a safe harbor relied on by visa applicants and their families." *Id.* at *28. They add factors to the public charge test that are not required. *See* 8 U.S.C. § 1182(a)(4)(B). Defendants "did not simply repeal an existing regulation or clarify the INA." *Id*. Instead, the FAM Revisions "impose new requirements on visa applicants and their families with respect to what benefits they can utilize without the risk of being deemed a public charge." *Id*. They were thus subject to notice-and-comment because they "effectively amend[] a prior substantive rule." *Sweet*, 235 F.3d at 91 (internal quotations omitted).

Because the FAM Revisions "effect[] substantive changes to the [agency's] definition of public charge," and thus constitute a substantive rule, *City of Baltimore*, 2019 WL 4598011 at *36, DOS was required to put these revisions through the notice and comment procedures of the APA. But Defendants DOS and Pompeo failed to do so when issuing the FAM revisions in January 2018. DOS did not provide any notice for the revisions and did not allow any participation by the public through formal notice and comment rulemaking. Indeed, DOS seems to concede as much; shortly after the *City of Baltimore* court found that the FAM Revisions were substantive, DOS issued an Interim Final Rule to alter the previous public charge scheme—an Interim Final Rule that it acknowledged would typically be subject to notice and comment.

2. The IFR Violated the APA's Notice and Comment Requirements

On October 11, 2019, less than a month after the *City of Baltimore* Court found that the FAM Revisions were substantive rules subject to notice-and-comment rulemaking, Defendants DOS and

Pompeo posted the IFR on the Federal Register, Ex. 4, 84 Fed. Reg. at 54,996, in an apparent attempt to cure some of the FAM Revisions' defects. Defendants purported to issue the IFR in order "to align the Department's standards with those of the Department of Homeland Security." *Id.* at 54,996. But Defendants issued the IFR the same day that three U.S. district courts enjoined the parallel DHS Rule, and just *four days* before it was intended to take effect on October 15, 2019. Rather than comply with formal notice and comment procedures, DOS "concluded that the good cause exceptions in 5 U.S.C. § 553(b)(3)(B) and (d)(3) apply to [the IFR] as the delay associated with notice and comment rulemaking would be impracticable, unnecessary, or contrary to the public interest." *Id.* at 55,011. The good cause exception applied, DOS claimed, because public charge standards that differed between DHS and DOS would cause "inconsistent adjudication standards and different outcomes between determination of visa eligibility and determination of admissibility at a port of entry." *Id.*

Defendants are wrong; there is no good cause to avoid notice-and-comment rulemaking here. Courts have made clear that the "good cause" exception of the APA, 5 U.S.C. § 553(b)(3)(B), "should be narrowly construed and only reluctantly countenanced." *Nat. Res. Def. Council* v. *Abraham*, 355 F.3d 179, 204 (2d Cir. 2004); *see also Nat. Res. Def. Council* v. *EPA*, 683 F.2d 752, 764 (3d Cir. 1982); *N.C. Growers' Ass'n, Inc.* v. *United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012). It is generally limited to "emergency situations, or where delay could result in serious harm." *Jifry* v. *FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (citations omitted), *see also Council of the S. Mountains, Inc.* v. *Donovan,* 653 F.2d 573, 581 (D.C. Cir.1981) (noting the case was one of "life-saving importance" involving miners in a mine explosion). "The burden is on the agency to establish that notice and comment need not be provided." *Nat'l Res. Def. Council* v. *Nat'l. Highway Traffic Safety Admin.*, 894 F.3d 95, 113–14 (2d Cir. 2018) (citations omitted). An action is in the "public interest," only "in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—

would in fact harm that interest." *Nat'l Highway Traffic Safety Admin*., 894 F.3d 95 at 114 (quoting *Mack Trucks*, 682 F.3d at 95). This is no such case.

Defendants' rush to mirror the unlawful DHS Rule is not the kind of emergency accepted as "good cause." The imminent implementation of the DHS Rule is not good cause, and in any event the DHS Rule is enjoined. *See MRNY*, 2019 WL 5484638 at *12. If this rationale were enough to circumvent the APA, "an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures." *Nat'l Highway Traffic Safety Admin*., 894 F.3d at 114–15. Nor is the DHS process an excuse: "previous solicitation and collection of comments regarding other rules . . . cannot substitute for notice and comment here." *Pennsylvania* v. *President of the United States*, 930 F.3d 543, 568 (3d Cir. 2019), *as amended* (July 18, 2019). "If the APA permitted agencies to forego notice-and-comment concerning a proposed regulation simply because they already regulated similar matters, then the good cause exception could largely obviate the notice-and-comment requirement." *Id*.

Additionally, Defendants' invocation of the "good cause" exception is undercut by the fact that Defendants were eager to implement a rule that was inconsistent with DHS's public charge guidelines when they promulgated and enforced the FAM Revisions. Defendants failed to act during the year in which DHS was considering comments on their "public charge" rule nor during the two months following its release. Instead, they waited until just four days before the DHS Rule was to go into effect to release their twenty-page IFR. The "court need not defer to an agency's own finding of good cause," especially in cases where Defendants' rationale is undermined by their own actions. *See Make the Rd. N.Y.* v. *McAleenan*, 405 F. Supp. 3d 1, 45 (D.D.C. 2019) (quoting *Sorenson Commc'ns Inc.* v. *FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014); *see also Council of S. Mountains, Inc.* v. *Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) ("[C]ircumstances justifying reliance on

[the good cause] exception are indeed rare and will be accepted only after the court has examine(d) closely proffered rationales justifying the elimination of public procedures").

Lastly, Defendants' approach to major revisions of the public charge rules—revisions that have life-altering consequences for immigrants and their families—smacks of gamesmanship and deliberate flouting of the APA. Three weeks after a court found that the FAM Revisions were substantive and required notice-and-comment rulemaking on the FAM Revisions, *see City of Baltimore*, 2019 WL 4598011 at *33, Defendants tried another tactic to avoid required public input: issuing the IFR with almost no notice, and seeking to invoke a good cause exception to excuse failure to promulgate the rule properly in the first place. This Court should not countenance Defendants' disregard for their obligations under the APA, and should set aside both the IFR and the FAM Revisions.

C. The FAM Revisions and the IFR Are Arbitrary and Capricious

A rule is arbitrary and capricious if the promulgating agency "has relied on factors which Congress has not intended it to consider, 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." *Motor Vehicle Mfrs. Ass'n of the U.S.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Further, "it would be arbitrary and capricious for the agency's decision making to be internally inconsistent.'" *Batalla Vidal* v. *Nielsen*, 279 F. Supp. 3d 401, 428 (E.D.N.Y. 2018), quoting *Nat'l Res. Defense Council* v. *U.S. Nuclear Reg. Comm'n*, 879 F.3d 1202, 1204 (D.C. Cir. 2018). The FAM Revisions and the IFR each fail on at least one of these grounds.

1. DOS Has Offered No Rationale for the FAM Revisions

DOS has *never* offered any explanation for its decision to revise the FAM to depart from the 1999 Field Guidance and impose dramatically new criteria for admission. The FAM Revisions are therefore on their face arbitrary and capricious, because DOS has never published any explanation

whatsoever for changes that have resulted in a 12-fold increase in denials of admission based on public charge. *See supra* notes 11–12; Ex. 10, Van Hook Decl., ¶ 22; *City of Baltimore*, 2019 WL 4598011 at *29 (finding plaintiffs adequately alleged that FAM revisions were arbitrary and capricious). Moreover, the FAM Revisions are plainly inconsistent with the DHS and DOS Rules, which, though contrary to law and arbitrary and capricious in their own way, rejected many of the most arbitrary aspects of the FAM Revisions. For example, the DHS Rule, perhaps in recognition of the agency's lack of authority to promulgate retroactive regulations, *see infra* pp. 30–31, declined to penalize past receipt of non-cash benefits that were not considered in the 1999 Field Guidance, Ex. 5, 84 Fed. Reg. at 41,304, giving applicants "adequate time to make decisions about receiving public benefits on or after the effective date." *Id*. at 41,458. Further, the DHS Rule did "not attribute U.S. citizen children's receipt of public benefits to their parents who are subject to the public charge inadmissibility ground." *Id*. at 41,482. Thus even DHS recognized that penalizing applicants for past receipt of non-cash benefits or for benefits received by their citizen children would cause grave harm to families, and attempted to take steps to "mitigate" that harm. *Id*. Similarly, in issuing the IFR, DOS explicitly ruled out retroactive consideration of benefits received by applicants' family members. Ex. 4, 84 Fed. Reg. at 55,003. DOS's failure to evaluate the impact of the FAM Revisions before issuing and applying them renders them arbitrary and capricious.

2. The IFR's Scheme is Arbitrary and Capricious, and DOS Offers No Justification for the Dramatic Policy Change

Like the DHS Rule that it largely replicates, the IFR is arbitrary and capricious. *First*, provisions such as the 12/36 threshold, the English language proficiency factor, and the negative weighting of ages younger than 18 or older than 62 are arbitrary on their face, and the IFR's confusing totality of the circumstances test lends itself to arbitrary enforcement. *Second*, DOS has offered no rationale for departing from the 1999 Field Guidance, much less grappled with the impact of its new

policy. This failure alone – inevitable, given its violation of notice-and-comment requirements, *see supra* pp. 22–25 – renders the IFR arbitrary and capricious.

a. The IFR's New Framework is Irrational and Will Result in the Arbitrary Denial of Numerous Applicants for Admission

As this Court held in enjoining the DHS Rule, "there is no logic to this framework" of changing "the public charge assessment into a *benefits* issue, rather than an inquiry about *self-subsistence*, such that any individual who is deemed likely to accept a benefit is considered a public charge," even when "this individual is legally entitled" to benefits. *MRNY*, 2019 WL 5484638 at *8. The IFR, like the DHS Rule, directs government officials to predict, based on an array of confusing factors, whether "an individual is likely to have benefits for 12 months out of a 36-month period." *Id*. at *9. DOS provides no explanation for how it arrived at such a standard, which could penalize those who receive even tiny amounts of nutritional assistance for a year. By making its focus the predicted use of a minimal amount of benefits in a short time frame, the DHS Rule thus "entirely rework[s]" the public charge assessment "with no rational basis." *Id*. at *8–9. The stacking scheme—by which the receipt of two public benefits in one month counts as two months for purposes of the 12/36 threshold, *see* 22 C.F.R. § 40.41(b)—exacerbates the arbitrary nature of the standard. *See* Ex. 12, Trisi Decl., ¶¶ 15, 42 (explaining arbitrary nature of consular officers trying to predict future benefit use that falls within the 12/36-stacking scheme).

Additional factors that purport to assist in predicting whether an applicant for admission will become a public charge (that is, someone likely to use 12 months of benefits in a 36-month period at any time in the future) are likewise arbitrary. For example, the "suggestion that an individual is likely to become a public charge simply by virtue of her limited English proficiency is baseless, as one can certainly be a productive and self-sufficient citizen without knowing *any* English. . . . It is simply offensive to contend that English proficiency is a valid predictor of self-sufficiency." *MRNY*, 2019

WL 5484638 at *9. This is particularly so given that the IFR contains no standard for evaluating "proficiency," lending itself to arbitrary and discriminatory enforcement.

Similarly, the IFR assigns negative weight to an applicant's age if she is under 18 or over 62. Ex. 4, 84 Fed. Reg. at 54,996, 55,001. There is no logic to either cutoff. The intending immigrants targeted by the IFR are ineligible for most federal benefit programs until five years after becoming lawful permanent residents. A seventeen-year-old has her whole working life ahead of her. The idea that, *five years after admission*, when she is 22, she is more likely to use 12 months of benefits in any 36-month period than someone who is 18 at the time of admission and 23 at the age of eligibility for benefits is plainly capricious. The IFR negatively weighs age over 62, well under the retirement age of most Americans, even as DOS claims that it "does not intend to imply" that such individuals "are unable to work." *Id.* at 55,001–02.

Thus, DOS' stated justification for various new factors—"self-sufficiency," assumed by DOS to mean avoidance of public benefits—falls apart even under DOS' own terms. DOS has produced no evidence that the IFR promotes "self-sufficiency," a phrase that appears nowhere in the INA but that the IFR repeatedly and illegitimately cites as justification for various provisions.[16] Moreover, the IFR ignores evidence made available to DHS demonstrating that supplemental benefits promote rather than impede self-sufficiency,[17] including INS's own observation in promulgating the 1999

[16] In the analysis of comments published with the final DHS Rule, DHS *conceded* that PRWORA's policy statements about self-sufficiency were not codified in the INA, including in the public charge inadmissibility provision, which makes no mention of "self-sufficiency." *See* Ex. 5, 84 Fed. Reg. at 41,355–56.

[17] *See, e.g.*, Ex. 51, Center for Law and Social Policy (CLASP), Comment on DHS Rule, at 4, 12, 19, 21, 31-36 ("Access to Health, Nutrition, And Other Key Supports for Working Families Has Positive Effects on Individuals' Long-Run Economic and Educational Attainment, Which in Turn Contribute to Self-Sufficiency"), 85 ("Having safe and stable housing crucial to a person's good health, sustaining employment, and overall self-sufficiency"), 87-88, 95, 101 & 107 (generally noting same) (*available at* https://www.regulations.gov/document?D=USCIS-2010-0012-42444); Ex. 52, Food Research and Action Center (FRAC), Comment on DHS Rule, at 2 ("SNAP . . . Medicaid, Medicare Part D Low Income Subsidy, and public housing assistance . . . . create[] the underpinnings of sound public policy that protects families in times of need and launches them toward self-sufficiency") (*available at* https://www.regulations.gov/document?D=USCIS-2010-0012-48234).

Field Guidance that noncash benefits are "available to families with incomes far above the poverty level" and that these benefits are meant to "assist[] working-poor families in the process of becoming self-sufficient." Ex. 41, 64 Fed. Reg. at 28,678.

Finally, these factors in combination result in a higher risk of denial for nonwhite immigrants, resulting in the highest risks for Latino and Black applicants for admission, even when, as analysis of census data shows, they are unlikely to receive benefits once they become eligible. Ex. 10, Van Hook Decl. ¶¶ 72–73. These risks are particularly high for low-income Mexicans and Central Americans, despite that "poor, low-skilled labor migrants . . . have unusually high rates of employment and relatively low levels of public benefits use." *Id.*, ¶ 73. Indeed, the addition of the English language proficiency factor alone accounts for far higher risk of denials, with disproportionate increases in risk to Latino, and particularly Mexican and Central American, applicants. *See id.*, ¶¶ 46, 48, Table 4, Supp. Table S1. The statistically predictable outcome of the new regime is to exclude large numbers of immigrants of color who are not likely to become a "public charge" even under the new definition promulgated by DOS.

b. DOS Failed to Justify Departing from the Field Guidance

An agency seeking to change an existing policy must "display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2126 (2016). An agency is required to provide a detailed justification when "its new policy rests upon factual findings that contradict those which underlay its prior policy." *F.C.C.* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "[L]ack of a reasoned explanation for a policy that requires a departure from years of agency practice results in a rule that cannot carry the force of law." *R.F.M.* v. *Nielsen*, 365 F. Supp. 3d 350, 379 (S.D.N.Y. 2019). Courts have found that federal agencies' anti-immigration actions were arbitrary and capricious for failing to justify departures from prior policies. *See, e.g.*, *id.* at 382–83; *Saget* v. *Trump*, 375 F. Supp. 3d 280, 354–59

(E.D.N.Y. 2019); *New York* v. *Dep't of Justice*, 343 F. Supp. 3d 213, 239–41 (S.D.N.Y. 2018); *New York* v. *U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 654–60 (S.D.N.Y. 2019).

Defendants acknowledge that the IFR varies from the Field Guidance, *e.g.*, Ex. 4, 84 Fed. Reg. at 54,998–99, but fail to provide reasoned explanations, instead pointing to a need for consistency with the DHS Rule. But DHS, which characterized the 1999 Field Guidance as "overly permissi[ve]," Ex. 5, 84 Fed. Reg. at 41,319, neither cited adverse results flowing from the allegedly permissive standard, nor explained how the Field Guidance disserved the goal of furthering immigrant self-sufficiency as set forth in the PRWORA findings. Even assuming findings in a 24-year old statute could justify the radical changes reflected in the IFR, DHS did not explain how its new definition of "public charge" better reflects Congressional intent in PRWORA than the one established in the Field Guidance, issued less than three years after PRWORA. Defendants here do nothing to cure those defects or to provide their own explanation for the IFR.

In issuing the IFR, DOS dramatically broadened the sweep of the public charge definition, instituted a far-reaching benefit-usage threshold, added many more factors for consideration, and created an entirely opaque weighing scheme that gives individual consular officers standardless discretion to deny admission. It did so in a slapdash way guaranteed to create confusion and invite arbitrary enforcement, rushing out the regulation without having prepared the paperwork necessary to implement it. Together, these facets of the IFR create an arbitrary and capricious regulation that is unworkable, unjustified, and unlawful.

D. The FAM Revisions are Impermissibly Retroactive

Plaintiffs are likely to succeed in showing that the FAM Revisions are impermissibly retroactive. The FAM Revisions require consular officers to evaluate past receipt of non-cash assistance by the intending immigrant and past or current receipt of any benefits by the intending immigrant's household members, including U.S. citizen children. Ex. 2, 9 FAM § 302.8-2(B)(1).

Receipt of these benefits would not have resulted in a public charge determination—and indeed, would not even have been considered—when they were received. *Id*. The FAM Revisions thus penalize intending immigrants for decisions made in the past that they cannot undo.[18]

"[R]etroactivity is not favored in the law." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Absent "express terms," "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules." *Id*. A rule is impermissibly retroactive if it "'alter[s] the past legal consequences of past actions.'" *Celtronix Telemetry, Inc.* v. *FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001) (citations omitted). And absent an express allowance for retroactivity in the statute, a rule may not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994).

There is nothing in the INA that authorizes retroactive rulemaking, and thus the FAM Revisions exceed DHS's rulemaking authority. *See Rock of Ages Corp.* v. *Sec'y of Labor*, 170 F.3d 148, 158–59 (2d Cir. 1999). As the federal district court in the District of Maryland has already held, the revisions penalize intending immigrants for "transactions already completed" that they cannot now change because they "direct[] consular officers to consider an immigrant's use of non-cash benefits at any time . . . ." *City of Baltimore*, 2019 WL 4598011 *28. This Court should find the same, and should conclude that Plaintiffs are likely to prevail on this basis as well.

E. The Proclamation Violates the INA and the APA and is Ultra Vires

The INA allows the President to issue proclamations to "suspend" or "impose restrictions" on the entry of foreign-born persons if he "finds" such entry to be "detrimental to the interests of the

[18] Notably, the DHS Rule, finalized after notice-and-comment procedures, does not penalize intending immigrants for the receipt, prior to October 15, 2019, of non-cash benefits that had been excluded from consideration by the 1999 Field Guidance, or for any receipt of benefits by household members. Ex. 5, 84 Fed. Reg. at 41,501, 41,503. Nor does the IFR. *See* 22 C.F.R. § 40.41(c)(1).

United States." 8 U.S.C. § 1182(f). But this power does not permit the President to "override particular provisions of the INA," *Trump* v. *Hawaii*, 138 S.Ct. 2392, 2411 (2018), or to enact drastic changes to the family-based immigration regime in the absence of factual findings. Yet that is exactly what the Proclamation does: it eliminates the totality of circumstances assessment required by the statute in favor of a single, poorly-defined factor – the ability to obtain "approved" private health care coverage or to absorb medical costs, *see* Ex. 6, 84 Fed. Reg. at 53,991–93 — and it does so on the basis of conclusory assumptions rather than documented facts. No President has ever used section 1182(f) to address long-term domestic concerns, and the Defendants' unprecedented, unlawful, and baseless decision to rewrite the statute to bar hundreds of thousands of otherwise eligible intending immigrants is *ultra vires* and violates the separation of powers.

Through the public charge provision of the INA, Congress spoke directly to the concerns that immigrants might burden the public fiscally. The statute requires that in addition to the affidavit of support, officials making public charge determinations consider "at a minimum," five general factors: (1) age; (2) health; (3) family status; (4) assets, resources, financial status; and (5) education and skills. *See* 8 U.S.C. § 1182(a)(4). The text of the Proclamation renders a sliver of one of these factors, financial resources to absorb medical costs, dispositive, eliminating consideration of four other factors that Section 1182(a)(4) requires be taken into account. This direct conflict with an explicit provision of the INA renders the Proclamation invalid. Further, the Proclamation applies to the family members of victims of violent crime and domestic violence, even though "Congress exempted from the public charge financial burden restriction certain victims of violent crime or domestic violence and their family members." *Doe #1*, 2019 WL 6324560 at *16 (citing 8 U.S.C. §1182(a)(4)(E)).[19] The

[19] The groups exempt from the public charge determination include immigrant relatives of victims of violent crime, *see* 8 U.S.C. § 1101(a)(15)(U)(iii), and victims who were subjected to battering and extreme cruelty, *see* 8 U.S.C. § 1154(a)(1)(A)(iii)-(vi).

Proclamation thus contradicts Section 1182(a)(4) and exceeds the authority granted by Section 1182(f) of the INA. As the Ninth Circuit held in evaluating a presidential proclamation contravening the asylum provisions of the INA, "the Executive has attempted an end-run around Congress. . . . [The proclamation] does indirectly what the Executive cannot do directly: amend the INA." *E. Bay Sanctuary Covenant* v. *Trump*, 932 F.3d 772, 774 (9th Cir. 2018).[20]

Further, the Proclamation violates the textual requirements of 8 U.S.C. § 1182(f), because it does not attempt to set forth factual findings to justify its sweeping suspension of nearly two thirds of prospective immigrants. *See* Ex. 10, Van Hook Decl., ¶ 75 (65 percent of visa applicants lack health insurance or have health insurance that does not qualify under the Proclamation). The Proclamation's stated purpose is to protect the country's health care system and taxpayers "from the burdens of uncompensated care" by suspending the "entry into the United States of certain immigrants who lack health insurance or the demonstrated ability to pay for their healthcare." Ex. 6, 84 Fed. Reg. at 53,991. But while making a number of conclusory assertions, the Proclamation does not set forth *any* factual findings or sources to support its conclusion. Nor could it. According to a recent U.S. government report documenting the impact of expanded access to Medicaid and the Children's Health Insurance Plus Program (CHIP), the uninsured rate has fallen 35 percent and the uncompensated care costs as a share of hospital operating expenses has fallen by 30 percent.[21] Immigrants are less likely than citizens to access services and are responsible for less than one-tenth of one percent of the country's

[20] To the extent that Defendants contend that the Proclamation is within the discretion conferred pursuant to Section 1182(f), it would be an unconstitutional delegation of the legislative authority to the executive. *See Gundy* v. *United States,* 139 S. Ct. 2116, 2123 (2019) (holding that Congress "may not transfer to another branch powers which are strictly and exclusively legislative.") (internal quotations omitted). The Court need not reach this question, however; under the canon of constitutional avoidance, where a serious constitutional question is raised, courts should construe statutes in a manner to avoid such questions. *See Clark* v. *Martinez*, 543 U.S. 371, 380–81 (2005). As such, the Court should hold that the delegation pursuant to which the Defendants seek to defend the Proclamation is unsupported by Section 1182(f).

[21] Ex. 50, Medicaid and CHIP Payment and Access Commission, "Report to Congress on Medicaid and CHIP" (March 2018) at 68, 70.

total medical costs. Ex. 9, Ku Decl., ¶ 18. There is no evidence in the government's record of a new crisis in the healthcare system, and definitely not one caused by uninsured immigrants. *Id*. ¶ 9.

Even if such findings existed, they could not demonstrate that entry of such visa-holders could be "detrimental" to the national interest, because Congress *expressly authorized* them to access upon arrival plans such as enrollment and subsidies under the Affordable Care Act's marketplace as well as Medicaid and CHIP for children and pregnant women. 42 U.S.C. § 18081(a)(1) (ACA); 42 U.S.C. § 1396b(v)(4) (Medicaid and CHIP for children and pregnant women). The President may not unilaterally decide that Congressionally-authorized domestic policy is "detrimental" to the United States and override the INA to subvert health care law. *Clinton* v. *City of New York,* 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."). No Court has ever held – and indeed, no President has ever attempted to show – that Section 1182(f) permits the President to add admissibility bars based on domestic policy concerns rather than exigencies of foreign affairs, much less in the absence of findings. There is no basis for this Court to depart from that history and precedent.

F. DOS's Implementation of the Proclamation Violates the APA

DOS's website announcement and Emergency Notice each constitute final agency action and are reviewable under the APA.[22] "[I]nsofar as [the agencies] have incorporated the Proclamation by reference into the Rule, we may consider the validity of the agency's proposed action." *E. Bay Sanctuary Covenant*, 932 F.3d at 770 (holding that agency rule, together with a Presidential Proclamation, contradicted the INA's asylum provisions and violated the APA). These implementing

[22] "Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive," *Franklin* v. *Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring); *see Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996) (court could review if executive order conflicted with federal statute where plaintiffs had sought to enjoin implementation).

actions are unlawful not only because they are contrary to the INA, *see supra* pp. 31–33, but also because they violate notice-and-comment requirements and are arbitrary and capricious.

1. The Proclamation's Implementing Regulation Violates the APA's Notice and Comment Requirements

On October 30, 2019, just five days before the Proclamation was to go into effect, Defendant DOS published the Emergency Notice which sought to "establish standards and procedures for governing" determinations under the Proclamation. Ex. 7, 84 Fed. Reg. at 58,199. The Emergency Notice was open for comment for less than 48 hours, with a deadline of October 31, 2019. *Id.* The Implementation Announcement and the Emergency Notice are substantive rules that alter the legal regime, and the truncated comment period deprived most Plaintiffs and other impacted parties the opportunity to meaningfully participate.[23] *See* 5 U.S.C. § 553(c) (requiring that agencies provide interested persons with the opportunity to participate in the rulemaking process). "To preserve the integrity of this process, 'the opportunity for comment must be a meaningful opportunity.'" *Pennsylvania*, 930 F.3d at 568 (citations omitted).

Defendants' less-than-48-hour comment period was an outright violation of the APA. Absent "exigent circumstances in which agency action was required in a mere matter of days," courts have been reluctant to accept such a short comment window. *N.C. Growers' Ass'n, Inc.* v. *United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012) (stating that instances warranting a 10-day comment period are "rare"). Plaintiffs are not aware of any as short as one day and a half. Nor have Defendants invoked any "good cause" or "foreign policy" exceptions to avoid notice and comment procedures, and they are precluded from raising a *post hoc* rationale here. *See* Ex. 7, 84 Fed. Reg. at 58,199; *see also Islander E. Pipeline Co., LLC* v. *Conn. Dep't of Env't Prot.*, 482 F. 3d 79, 95 (2d Cir. 2006)

[23] DOS' plan to implement the Proclamation through changes to the FAM, *see* Ex. 56, Admin. Rec. at 29–37, would likewise constitute final agency action that requires notice and comment rulemaking.

("[C]ourts may not accept [counsel's] *post hoc* rationalizations for agency actions. It is well established that an agency's actions must be upheld, if at all, on the basis articulated by the agency itself."). Defendants have, for no articulated reason, bypassed the APA requirements in their entirety, despite that fact that the rule is projected to have devastating impacts on individuals seeking immigrant visas. *See, e.g.,* Ex. 9, Ku Decl., ¶18 (estimating that the Proclamation could reduce immigrant entry by more than half, or around 293,000 persons per year).

2. Implementation of the Proclamation is Arbitrary and Capricious

The Implementation Announcement and Emergency Notice neither "examine[] the relevant data," nor articulate a "rational connection between the facts found and the choices made." *Nat. Res. Def. Council* v. *EPA.*, 658 F.3d 200, 215 (2d Cir. 2011) (citations omitted). Where Defendants have failed to evidence any "good reasons for the new policy," implementation of the Proclamation violates the APA. *Fox Tele. Stations, Inc.,* 556 U.S. at 515. Moreover, where "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" the agency action violates the APA. *Nat. Res. Def. Council* v. *EPA,* 658 F.3d at 215.

The Proclamation purports to protect the country's health care system and taxpayers "from the burdens of uncompensated care." Ex. 6, 84 Fed. Reg. at 53,991. But the eight specified types of "approved" coverage are also legally or practically unavailable to many, including most immigrants seeking family-based visas. *See Doe #1*, 2019 WL 5685204 at *4; Ex. 13, Sbrana Decl., ¶¶ 8–9; Ex. 11, Palanker Decl., Ex. A, ¶¶ 23–24.[24] The only viable options for "approved health insurance"

[24] Medicare is available only to individuals who are 65 years or older, and to certain persons with disabilities or with end stage renal disease. 42 U.S.C. § 1395 *et seq*. Lawful permanent residents must have been residing continuously in the U.S. for at least five years, or be eligible for Social Security benefits based on sufficient work history in the U.S. *See, e.g.,* 42 U.S.C. §1395i-2(a)(3). TRICARE plans are available only to members and former members of the United States military, their spouses, children and dependents. *See* 10 U.S.C. § 1072(1)–(2). More than half of immigrant visa applicants are family-based visa applicants, and unlikely to have an offer of employment before arriving in the U.S.; even individuals with employer-sponsored visas may not be able to show that they will have employer-sponsored health insurance within 30 days of their arrival. Employers are also permitted under

are non-comprehensive visitor insurance plans, catastrophic insurance plans,[25] and in some limited cases, STLDI plans (although such plans are not available in all 50 states, and are prohibited from sale in the state of New York), which often leave individuals underinsured or effectively uninsured, thus increasing uncompensated care costs and limiting access to care at the expense of public health. Ex. 11, Palanker Decl. Ex. A, ¶¶ 23–24; Ex. 13, Sbrana Decl. ¶¶ 9–10.

Ignoring this landscape as well as practical realities, the Proclamation does not include any health plan available under the ACA and pushes non-citizens to purchase non-ACA compliant plans, which typically do not offer essential benefits such as coverage for pre-existing conditions. Ex. 11, Palanker Decl., Ex. A, ¶¶ 23–34. The Proclamation and the agency actions to implement it will lead to the very harms the Proclamation purports to prevent and thus are arbitrary and capricious.

Moreover, the terms of the Proclamation and Emergency Notice are manifestly arbitrary, as they fail to define various crucial terms, including: "adequate coverage for medical care," "unsubsidized health plan," "catastrophic plan," "short-term limited duration health" insurance, and "law enforcement objectives." Ex. 6, 84 Fed. Reg. at 53,991–93. The Emergency Notice establishes no standards for implementing the Proclamation or guidance to consular officers regarding these terms. Instead, it calls for the oral collection of information and puts the onus on the consular officers to make health care coverage determinations for themselves. Moreover, the planned changes to the FAM do little to articulate standards: they fail to clarify which current medical conditions must be considered, what costs would be foreseeable, or how far out in the future to estimate costs for current

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federal law to impose a waiting period of up to 90 days before new employees can be covered by employer-sponsored coverage. 42 U.S.C. § 300gg-7.

[25] Where a family of four earns e.g. 125% of the poverty line—$32,187.50 in 2019 (*see* 2019 Annual Update of the HHS Poverty Guidelines, 84 Fed. Reg. 1168, https://www.govinfo.gov/content/pkg/FR-2019-02-01/pdf/2019-00621.pdf)—$8,150 annual catastrophic health insurance premiums are out of reach, as they would represent a full quarter (25.3%) of the family's annual income. U.S. Ctrs. For Medicare & Medicaid Servs., *How to pick a health insurance plan: Catastrophic health plans*, *available at* https://www.healthcare.gov/choose-a-plan/catastrophic-health-plans/ (last visited, Jan. 15, 2020) (noting $8,150 annual premium for catastrophic insurance).

existing conditions.[26] This regime allows "everything [to] hang[] on the fortuity of an individual official's decision," turning denials into a "sport of chance." *Judulang* v. *Holder*, 565 U.S. 42, 58–59 (2011) (citation omitted). This is what the "APA's 'arbitrary and capricious' standard is designed to thwart." *Id.*

II. Plaintiffs Have Standing to Challenge the Consular Rules

There can be no serious question as to the standing of individual Plaintiffs whose lives will be so dramatically altered by the Consular Rules. That alone is sufficient. *See Centro de la Comunidad Hispana de Locust Valley* v. *Oyster Bay*, 868 F.3d 104, 109 (2d Cir. 2017) ("It is well settled that where . . . multiple parties seek the same relief, the presence of one party with standing is sufficient.") (internal quotations omitted).

Organizational plaintiffs likewise have standing. An organization has standing when it is forced "to divert money from its other current activities to advance its established organizational interests." *Id*. at 110; *see, e.g.*, *Citizens for Responsibility & Ethics in Wash.* v. *Trump*, 276 F. Supp. 3d 174, 190 (S.D.N.Y. 2017) ("*CREW*") ("[A]n organization has standing where it is forced to expend resources to prevent some adverse or harmful consequence on a well-defined and particularized class of individuals."), *rev'd on other grounds*, 939 F.3d 131 (2d Cir. 2019). "[S]omewhat relaxed standing rules apply" in cases where "a party seeks review of a prohibition prior to its being enforced." *Oyster Bay*, 868 F.3d at 110 (citations omitted). Where "multiple parties seek the same relief, 'the presence

[26] The Administrative Record reveals confusion by consular officers rushing to understand the Proclamation's mandates. For example, in transcripts of an October 24, 2019 webinar given by DOS, participants asked, "Since we are not medical providers how do we know what various conditions cost? And also, what is considered substantial?" Ex. 56, Admin. Rec. at 115. The moderator responded, "You're going to have to use judgement [*sic*] on what is a significant cost," and later added, "we can't provide a cost estimate for certain medical conditions and again we would ask you to put the burden on the applicant." *Id.* at 115-16. On the other hand, contrary to the purported basis for the Proclamation, consular officers need not check whether the approved insurance covered a pre-existing condition; as the moderator advised, "If they have an approved health insurance plan you don't need to consider whether that will cover their medical condition." *Id.* at 114.

of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.'" *Id.* at 109 (quoting *Rumsfeld* v. *Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

Indeed, the harms suffered by organizational Plaintiffs are similar to those caused by the enjoined DHS Rule. With respect to the DHS Rule, this Court found that several of these same organizational Plaintiffs had standing. *MRNY*, 2019 WL 5484638 at *3–5. The Proclamation likewise has forced organizational Plaintiffs to expend resources to prevent their clients from suffering adverse or harmful consequences in connection with the Proclamation. *See, e.g.*, *CREW*, 276 F. Supp. 3d at 190. For example, MRNY would have to "spend significant time counseling our clients to make expensive and wasteful [health insurance] purchases that deplete their savings," Ex. 18, Oshiro Decl., ¶ 35, and CARECEN – NY's clients have been "forced to withdraw from benefits to use their funds on one of the expensive approved health insurance plans, which in many cases do not provide adequate coverage," Ex. 20, de Castillo Decl., ¶ 3.[27]

In short, the harms caused by the Consular Rules hinder organizational Plaintiffs' ability to deliver critical services to the clients they are mission-bound to serve. Thus, Defendants' actions will require organizational Plaintiffs to "expend resources they would not have otherwise spent to avert or remedy some harm." *See CREW*, 276 F. Supp.3d at 190.

Organizational Plaintiffs also fall within the zone of interests of the INA, as this Court held with respect to MRNY, ASC, CCCS-NY, and CLINIC. *MRNY*, 2019 WL 5484638 at *6. The inquiry

[27] For example, CARECEN has had to expend significant resources to train staff on how to mitigate the effects of the FAM Revisions and the IFR, and has "been forced to amend its intake and representation protocols and procedures in response to the FAM Revisions, IFR, and Proclamation." Ex. 20, de Castillo Decl., ¶ 12. MRNY has had to expend resources and "a substantial amount of [staff members'] time" to consult with clients and community members who could be subjected to the FAM Revisions or the IFR. Ex. 18, Oshiro Decl. ¶ 33. "The time and difficulty required for these cases has prevented some MRNY staff from taking on additional consular process cases, thereby limiting the organization's ability to help its members, clients and community." *Id.* Plaintiff organizations that operate partly on a fee-for-service basis, such as CARECEN and ASC, also suffer direct financial harm as the Consular Rules shrink the pool of eligible immigrants seeking assistance with visa applications. *See* Ex. 20, de Castillo Decl., ¶ 16; Ex. 19, Nichols Decl., ¶ 29.

"in the APA context . . . is not especially demanding" and forecloses suit "only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (internal quotations omitted). As the Second Circuit has explained, "the zone of interests test does not require the plaintiff to be an intended beneficiary of the law in question." *Citizens for Responsibility & Ethics in Wash.* v. *Trump*, 939 F.3d 131, 158 (2d Cir. 2019) ("*CREW II*").

Courts have repeatedly found that immigrant advocacy organizations like organizational Plaintiffs have standing to challenge immigration regulations in light of INA provisions that give immigrant advocacy organizations "a role in helping immigrants navigate the immigration process." *See e.g.*, *E. Bay Sanctuary Covenant* v. *Trump*, 909 F.3d 1219, 1245 (9th Cir. 2018), *superseded*, 932 F.3d 742 (9th Cir. 2018).[28] Further, the zone of interests test is satisfied by an "economic injury" that makes the plaintiff "a reliable private attorney general to litigate the issues of the public interest." *CREW II*, 939 F.3d at 156 (internal quotations omitted); *see Bank of Am.* v. *City of Miami*, 137 S. Ct. 1296, 1303–04 (2017) (finding that Miami's discriminatory lending claims seeking lost tax revenue against banks fell within zone of interests of the Fair Housing Act, despite absence of any indication Act was intended to protect municipal budgets); *MRNY*, 2019 WL 5484638 at *6. Organizational

[28] *See, e.g.*, *Batalla Vidal* v. *Nielsen*, 291 F. Supp. 3d 260, 269 n.3 (E.D.N.Y. 2018) (challenge to termination of DACA program), *cert. granted*, 139 S. Ct. 2773 (2019); *Al Otro Lado* v. *Neilsen*, 327 F. Supp. 3d 1284, 1299–1302 (S.D. Cal. 2018) (challenge to DHS asylum policy); *Doe* v. *Trump*, 288 F. Supp. 3d 1045, 1067–68 (W.D. Wash. 2017) (challenge to agency refugee policy). One district court considering a challenge to the public charge rule found that organizational Plaintiffs were not within the zone of interests of the public charge provision of the INA. *See City & Cty. of S.F.* v. *USCIS*, 408 F. Supp. 3d 1057, 1117–18 (N.D. Cal. 2019) (enjoining the Rule based on challenges by municipal plaintiffs). Plaintiffs respectfully submit that that decision is erroneous. Among other things, the court's narrow focus on what it viewed as the purpose of the public charge provision of the INA, *see id.* at 1118, is inconsistent with the approach taken by the Supreme Court in *Bank of Am.* v. *City of Miami*, 137 S. Ct. 1296, 1303–04 (2017), and by the Second Circuit in *CREW II*, 939 F.3d at 157–58. It also fails to address that, as this Court noted, "[t]he Supreme Court has consistently found that economic injuries like those alleged here satisfy the [zone of interests] test." *See MRNY*, 2019 WL 5484638 at *6.

Plaintiffs here have suffered, and will continue to suffer, economic injury as a result of Defendants' conduct, and satisfy this test. *See infra* pp. 45–46.

III. Plaintiffs Will Suffer Irreparable Harm Absent a Preliminary Injunction

Unless enjoined, the Consular Rules will cause plaintiffs substantial, concrete, and particularized harm by undermining families through indefinite separation, penalizing the use of benefits for which they and their families are eligible, requiring individuals to buy insurance plans for which they will never be reimbursed, and diverting their resources and injuring their mission. "Irreparable harm is 'the single most important prerequisite for the issuance of a preliminary injunction.'" *Faiveley Transp. Malmo AB* v. *Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (quoting *Rodriguez ex rel.* v. *DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999)). It exists where, absent a preliminary injunction, "[the movants] will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial." *Grand River Enter. Six Nations, Ltd.* v. *Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (internal quotations omitted). Plaintiffs need only show "a *threat* of irreparable harm, not that irreparable harm already ha[s] occurred." *Mullins* v. *City of New York*, 626 F.3d 47, 55 (2d Cir. 2010). This standard is easily met here.

As an initial matter, this Court can make a finding of irreparable harm even absent the ample record before the Court. Irreparable harm is "presumed . . . satisfied per se when a violation of federal law is shown since, in enacting the statute, Congress declared that violations of the statute are contrary to the public interest and, therefore, cause irreparable harm." *Heublein* v. *FTC*, 539 F. Supp. 123, 128 (D. Conn. 1982); *see also Concerned Residents of Taylor-Wythe, Edna Correa* v. *N.Y. City Hous. Auth.*, No. 96 CIV. 2349 (RWS), 1996 WL 452432, at *3 (S.D.N.Y. Aug. 9, 1996) ("As the New York State legislature has passed the statute, the legislature has implicitly stated that the violation of the statute causes harm to those affected, and to the public."). As described above, the Consular Rules

were promulgated in violation of the APA and are contrary to the INA. On this basis alone, the Court may presume irreparable harm will occur absent an injunction.

Moreover, there are three independent bases on which Plaintiffs establish irreparable harm:

A. Family Separation Will Result in Irreparable Harm

Each of the Consular Rules has or will have the impact of causing the denial of immigrant visa applications that would have been granted prior to the Consular Rules, resulting in an indefinite period of family separation.[29] It is well-established that indefinite family separation is a form of irreparable harm. *See, e.g.*, *Doe #1*, 2019 WL 6324560 at *17 (finding family separation caused by the Proclamation to be the basis for irreparable harm in issuing preliminary injunction); *Washington* v. *Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017). Courts in this circuit have recognized the same. *See*, *e.g.*, *Martinez* v. *McAleenan*, 385 F. Supp. 3d 349, 371 (S.D.N.Y. 2019) ("[C]ourts recognize the irreparable harms that stem from being unlawfully separated from family."); *J.S.R.* v. *Sessions*, 330 F. Supp. 3d 731, 742 (D. Conn. 2018) (granting preliminary injunction and recognizing separation from family as a type of irreparable harm).

Here, it has already been established that the harm of separating Plaintiffs from their families in the U.S. is extreme. The standard for obtaining a provisional I-601A waiver from DHS is demonstrating "extreme hardship" if separated from a U.S. citizen spouse or parent, *see* INA § 212(a)(9)(B)(v), and DHS has already found three Plaintiffs to have met this burden. Ex. 14, Brenda Doe Decl., ¶ 9; Ex. 15, Carl Doe Decl., ¶ 8; Ex. 17, Eric Doe Decl., ¶ 7. Absent an injunction, Plaintiffs face the extreme hardship of indefinite family separation when they leave the U.S. to undergo consular processing to complete the process of obtaining lawful permanent resident status, as they are likely

[29] Since the FAM Revisions went into effect in January 2018, there has been a twelve-fold increase in public charge denials at consular processing. *See supra* note 11. If the IFR takes effect, the increase in public charge denials will place many more immigrants at risk of denial. Ex. 10, Van Hook Decl., ¶ 60. As for the Proclamation, more than half of entering immigrants lack private health insurance. Ex. 9, Ku Decl., ¶ 18.

to be denied as a result of the changes wrought by the Consular Rules.[30] For example, certain Plaintiffs will be penalized for family members' receipt of benefits under the FAM or their own receipt of public health insurance for which they were eligible.[31] Plaintiffs will likely be treated negatively under numerous IFR factors.[32] Plaintiffs also cannot meet the Proclamation requirements of qualifying health insurance or sufficient assets to cover foreseeable medical expenses,[33] ability to purchase insurance without an irremediable economic loss,[34] or ability to afford the insurance.[35]

B. The Penalty Placed Upon Receipt of Benefits Is Causing Irreparable Harm

By penalizing receipt of benefits, both by intending immigrants and their family members and sponsors, the Consular Rules discourage the use of public benefits for which those individuals

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[30] *See, e.g.*, Ex. 14, Brenda Doe Decl., ¶¶ 12–13, 16–17 (would have to return to the Dominican Republic indefinitely without her disabled husband and her three children); Ex. 15, Carl Doe Decl., ¶¶ 8–12 (would have to return to El Salvador indefinitely, lose his wife's companionship, and lose the business he is building); Ex. 16, Diana Doe Decl., ¶¶ 9–13 (would have to return to Mexico, leaving her children, husband and mother without her support); Ex. 17, Eric Doe Decl. ¶¶ 4–9 (if his wife returned to Mexico indefinitely, he would be left to raise their two young boys and contend with his chronic leukemia alone).

[31] *E.g.*, Ex. 17, Eric Doe Decl., ¶ 6 (state-funded health insurance needed to treat leukemia); Ex. 14, Brenda Doe Decl., ¶¶ 8, 10 (past cash assistance and SSI; state funded health care; SNAP); Ex. 15, Carl Doe Decl., ¶ 10 (eligible for and receiving public health insurance since 2014).

[32] Negative factors include: household incomes slightly below 125 percent of their household size despite long work histories, *see e.g.*, Ex. 15, Carl Doe Decl., ¶ 7; Ex. 14, Brenda Doe Decl., ¶ 8; Ex. 16, Diana Doe Decl. ¶ 7; co-sponsors who do not reside with them or are not immediate family members, *see e.g.*, Ex. 14, Brenda Doe Decl., ¶ 11 (co-sponsor is sister-in-law); and a lack of education and work experience, *see e.g.*, *id*., ¶ 5. Each of the plaintiffs and plaintiff Eric Doe's wife are from countries where Spanish is the dominant language. *See generally* Exs. 14–17. In addition, each of the plaintiffs were born in Spanish speaking countries, but have lived in the U.S. for some time. Because the IFR sets forth no standards for how the "English language proficiency" factor is to be met, it is unclear whether the factor would weigh for or against them.

[33] Ex. 14, Brenda Doe Decl., ¶¶ 8, 13; Ex. 17, Eric Doe Decl., ¶ 6.

[34] Ex. 15, Carl Doe Decl., ¶ 11.

[35] Ex. 17, Eric Doe Decl., ¶ 6. Even where an intending immigrant can meet the Proclamation requirements, for example by purchasing a catastrophic plan, she would still experience irreparable harm in the form of unrecoupable monetary damages. Although catastrophic plans may carry premiums that some low-income families could cover, *see* N.Y. State of Health, *Search for Plans*, *available at* https://nystateofhealth.ny.gov/individual/searchAnonymousPlan/searchPlans (indicating that the lowest cost monthly premium for a hypothetical person living in upper Manhattan (zip code 10031) for catastrophic coverage is $178.75 per month), the deductibles are so high, *see supra* note 25, and the conditions on coverage so limiting (almost every form of service needs to be paid out of pocket until the deductible is reached), that a person purchasing such plan could be spending anywhere from $2,145 (premiums only; no care) to $10,295 a year (premiums and full deductible met). *Id*. Plaintiffs will never be able to recoup such costs if the Proclamation is ultimately found unlawful.

otherwise qualify. Expert analysis demonstrates that the IFR has already had—and, if implemented, will continue to have—a chilling effect comparable to that of the DHS Rule. *See, e.g.*, Ex. 9, Ku Decl., ¶ 14 (opining that the impact of the IFR will be comparable to the impact of the DHS Rule); *id*., Ex. B, ¶¶ 25–33 (describing chilling effect of DHS Rule); *id*., Ex. B, ¶¶ 46–54 (estimating that between 1 million and 3.1 million members of immigrant families will forego or disenroll from federal Medicaid each year after full implementation of DHS Rule).[36] The harm caused by the FAM Revisions is in some ways even more direct, as they *explicitly penalize* intending immigrants for "[p]ast or current receipt of public assistance of *any* type . . . ," *see* Ex. 2, at 302.8-2(B)(2) (emphasis added); whereas the DHS Rule has been found to have a devastating chilling effect even though it *excludes* consideration of benefits used by household members and limits the types of benefits that count. Finally, fewer immigrants will use government-funded benefits if the Proclamation goes into effect. *See* Ex. 9, Ku Decl., Ex. B, ¶ 23-24 (describing how the Proclamation steers immigrants away from Medicaid or tax-subsidized health insurance marketplace coverage); Ex. 13, Sbrana Decl., ¶ 10. This chilling effect constitutes an irreparable harm to both organizational and individual Plaintiffs.

Individual Plaintiffs are already experiencing this category of harm. Brenda Doe has chosen to forego accessing state-funded Medicaid for which she is eligible based on her approved I-130

[36] *See also* Ex. 55, Center on Budget and Policy Priorities, Comment on IFR, at 10 (Nov. 12, 2019) (hereinafter "CBPP IFR Comment") (explaining that "[t]he family members of immigrant applicants in the U.S. are at risk of being chilled from accessing benefits for which they are eligible due to confusion and fear related to wanting to make sure they do nothing that could jeopardize their family members' ability to immigrate to the U.S."); Hamutal Bernstein *et al*., "With Public Charge Looming, One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018," Urban Institute (May 21, 2019), *available at* https://www.urban.org/urban-wire/public-charge-rule-looming-one-seven-adults-immigrant-families-reported-avoiding-public-benefit-programs-2018 (finding that 20.7 percent of adults in families with incomes below 200 percent of the poverty level reported that they or a family member forewent non-cash benefit programs in 2018 out of fear for their future green card status); Jennifer Tolbert, Samantha Artiga, and Olivia Pham, "Impact of Shifting Immigration Policy on Medicaid Enrollment and Utilization of Care among Health Center Patients," Kaiser Family Foundation (Oct. 15, 2019), *available at* https://www.kff.org/medicaid/issue-brief/impact-of-shifting-immigration-policy-on-medicaid-enrollment-and-utilization-of-care-among-health-center-patients (finding immigrant patients, including pregnant women, refusing to enroll or re-enroll in Medicaid because of fear of public charge).

because of her justified fear of the immigration consequences. Ex. 14, Brenda Doe Decl., ¶ 14. She rightly fears that her household members' benefits receipt will be counted against her, even though those benefits are critical to their health and supplement income gaps created by her husband's disabilities. Plaintiff Eric Doe makes a good living for his family but his employers do not provide health insurance. Ex. 17, Eric Doe Decl., ¶ 6. Given his chronic cancer diagnosis, his survival depends on continued access to affordable health care. Giving up his state-funded health insurance to make his wife's application for an immigrant visa more viable is not a reasonable option.

The risk to personal health and safety has been documented in a study of the similar DHS rule. *See* Ex. 9, Ku Decl., Ex B, ¶¶ 9, 55–62 (estimating that immigrant families refusal of Medicaid because of the DHS Rule would cause 1,300 to 4,000 premature deaths per year). Courts have routinely found that the risk of lack of access to medical care is an irreparable harm.[37]

C. The Consular Rules Are Resulting in the Diversion of Organizational Plaintiffs' Limited Resources and the Frustration of their Mission

Contending with the harms visited on their members and clients is causing organizational Plaintiffs to experience a diversion of resources and frustration of mission that are themselves irreparable harms. *See MRNY*, 2019 WL 5484638 at *17 (finding diversion of resources experienced by organizational Plaintiffs caused by DHS Rule to be irreparable harm); *Doe #1*, 2019 WL 6324560 at *17 (finding that diversion of resources experienced by organizational Plaintiff caused by Proclamation to be a basis for irreparable harm); *see Centro de La Comunidad Hispana de Locust Valley* v. *Town of Oyster Bay*, 868 F.3d 104, 111 (2d Cir. 2017) ("[W]here an organization diverts its resources away from its current activities, it has suffered an injury that has been repeatedly held to be independently sufficient to confer organizational standing."); *see also Saget*, 375 F. Supp. 3d at 376

[37] *See, e.g., Strouchler* v. *Shah*, 891 F. Supp. 2d 504, 522 (S.D.N.Y. 2012) ("[T]he mere *threat* of a loss of medical care . . . even if never realized, constitutes irreparable harm."); *see also Commc'ns Workers of Am.* v. *Nynex Corp.*, 898 F.2d 887, 891 (2d Cir. 1990) ("[T]he threatened termination of benefits such as medical coverage for workers and their families obviously raise[s] the spectre of irreparable injury.").

(holding that organizations that need to shift resources to provide specific services in response to challenged policies have suffered irreparable harm). The monetary injuries caused by diversion of resources alone – injuries for which the APA provides no remedy – constitute irreparable harm. *See, e.g.*, *Marnell* v. *Kingston Pub. Access Cable Comm'n*, No. 1:08-CV-0303 (LEK/DRH), 2009 WL 1811899, at *1 (N.D.N.Y. June 25, 2009) (holding the plaintiff will suffer irreparable harm absent injunctive relief where monetary damages are not available); *Pennsylvania* v. *President*, 930 F.3d 543, 574 (3d Cir. 2019); 5 U.S.C. § 702 (2018).

Organizational Plaintiffs are all experiencing such harms. They are facing the prospect of an irretrievable loss of revenue. Ex. 19, Nichols Decl., ¶¶ 19, 20, 26–29; Ex. 20, de Castillo Decl., ¶ 16; Ex. 22, Wheeler Decl., ¶¶ 19–22.) They are experiencing a drain on resources needed to address other issues. Ex. 18, Oshiro Dec. ¶¶ 32–34; Ex. 21, Russell Decl., ¶¶ 20–23, 27–34, 36; Ex. 22, Wheeler Decl., ¶ 18. And they are experiencing injury to their missions. Ex. 18, Oshiro Decl. ¶¶ 38–42; Ex. 19, Nichols Decl. ¶¶ 15–17; Ex. 20, de Castillo Decl., ¶ 15; Ex. 21, Russell Decl., ¶ 45; Ex. 22, Wheeler Decl., ¶ 13. Further, the organizations were deprived of the opportunity to participate meaningfully or at all in notice-and-comment rulemaking, a core advocacy tool. *See supra* pp. 17.

IV. The Balance of Equities and Public Interest Support a Preliminary Injunction

"[B]ecause the Government is a party, and 'the Government's interest *is* the public interest,' the balance of hardships and public interest merge as one factor." *Saget*, 375 F. Supp. 3d at 339–340 (quoting *Dep't of Commerce*, 351 F. Supp. 3d at 673).

A. There is No Public Interest in Unlawful Rules

There is no public interest in allowing the Consular Rules to take effect, as "there is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters* v. *Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). To the contrary, there is a substantial public interest "in having governmental agencies abide by the federal laws that govern their existence and operations."

Washington v. *Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). That public interest is "particularly strong where [as here] the rights to be vindicated are constitutional in nature." *V.W. ex rel. Williams* v. *Conway*, 236 F. Supp. 3d 554, 589 (N.D.N.Y. 2017).

When there are "serious concerns" that the President has failed to "exercise his executive powers lawfully," "the public interest is best served by 'curtailing unlawful executive action.'" *See Hawaii* v. *Trump*, 878 F.3d 662, 700 (9th Cir. 2017) (quoting *Texas* v. *United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally-divided court*, 136 S. Ct. 2271 (2016)); *see also Doe* v. *Trump*, 284 F. Supp. 3d 1172, 1179 (W.D. Wash. 2018) ("Where the Government's actions thwart Congressional intent and undermine Congressionally-enacted statutes, the public interest is best served by curtailing those actions.").

B. The Public Has a Strong Interest in Preventing the Enormous Harm that the Consular Rules Are Already Causing and Will Continue to Cause

The Consular Rules also would irrevocably and negatively impact U.S. citizens, immigrant communities throughout the country, and the general public interest.

This Court has already held that enjoining the DHS Rule to "prevent[] the alleged economic and public health harms provides a significant public benefit." *MRNY*, 2019 WL 5484638 at *11. Here, too, because the FAM Revisions and IFR intend to bring about the same effect that DHS sought through its enjoined public charge rule—namely, a reduction in family-based immigration and the conversion of U.S. immigration policy to an arbitrary and discriminatory wealth-based system—their consequences include those same economic and public health harms that supported the prior injunction. *See* Ex. 9, Ku Decl., ¶ 14 ("the IFR will cause harm to the applicable population in a substantially similar manner as [] the DHS Rule"); Ex. 12, Trisi Decl., ¶¶ 22–26.

Moreover, as detailed above and in the accompanying expert declarations, the FAM Revisions' penalization of benefits receipt and the IFR's chilling effects will result in substantial harm to the health and welfare of immigrant communities. The Consular Rules have already affected

applicants and their families: since publication of the FAM Revisions, initial denials on public charge grounds have undergone a twelve-fold increase that has disproportionately harmed nonwhite applicants. And as "rates of denials increase under the new rule, the corresponding chilling effect will also increase." Ex. 9, Ku Decl., Ex. B, ¶ 29 (predicting how the increase in denials under the FAM will increase once the DHS rule is implemented). The effect is substantial: Months prior to DOS's issuance of the IFR, DHS had conceded that its proposed public charge provision would cause hundreds of thousands of noncitizens to forego benefits *for which they legally eligible*; as a result, DHS estimated that these individuals would lose nearly $1.5 billion in federal benefits payments, and more than $1 billion in state benefits payments, every year.[38] It is not only noncitizens who would bear the burden: millions of U.S. citizen family members are expected to dis-enroll or decline to participate in benefits programs for which they are eligible, including up to 3.1 million members of immigrant families form Medicaid, resulting in as many as 4,000 excess premature deaths per year. Ex. 9, Ku Decl., ¶¶ 26, 46–54.[39]

Finally, the claimed benefit of the Proclamation – a reduction in uncompensated healthcare costs – is undermined by the fact that its implementation is more likely to do the opposite, including increasing the uncompensated costs of medical care in emergency rooms. Ex. 11, Palanker Decl., Ex. A, ¶¶ 23, 26–28; Ex. 13, Sbrana Decl., ¶ 10.

There is no countervailing interest on the part of Defendants that would result in any "actual hardship" were an injunction entered. The stated intention of the IFR is to align its "standards with those of the Department of Homeland Security" to avoid inconsistent application of the public charge provision. Ex. 4, 84 Fed. Reg. at 54,996. However, as the DHS Rule has been enjoined, the public

[38] DHS, Economic Analysis Supplemental Information for Analysis of Public Benefits Programs, at 5, 7, 10-11 & Table 1, https://www.regulations.gov/document?D=USCIS-2010-0012-63742.

[39] *See also* Ex. 55, CBPP IFR Comment, at 10–11 (enumerating effects on families, including "ripple effect" emerging from pregnant women's nonparticipation in Medicaid).

charge scheme to which DOS is attempting to conform is in fact *not* the one under which DHS currently evaluates intending immigrants. Rather, Defendants can and should continue to apply the existing public charge framework as they have done for over 20 years. *See Airbnb, Inc.* v. *City of New York*, 373 F. Supp. 3d 467, 500 (S.D.N.Y. 2019) (government faces only a "slight hardship[]" in being temporarily delayed from enforcing a regulation).

C. These Same Factors Support Entry of a Full and Nationwide Injunction

Complete relief for plaintiffs at this time necessitates a preliminary injunction of all three Consular Rules. If the Court postpones the IFR without enjoining the FAM Revisions, Plaintiffs will continue to be harmed as sponsors and other family members of intending immigrants are penalized for using government benefits. Similarly, if the Proclamation is permitted to take effect, Plaintiffs who are likely to be excluded on public charge grounds under the revised FAM or the IFR are likely to be excluded based on their inability to obtain qualifying private health insurance. Only a return to the pre-January 2018 FAM rules on public charge will provide complete relief.

Further, any injunction or postponement of the Consular Rules should apply nationwide. Although "[t]he scope of injunctive relief should be no broader than necessary to cure the effects of the harm caused by the violation . . . there is no requirement that an injunction affect only the parties in the suit." *See MRNY*, 2019 WL 5484638 at *12 (enjoining public charge rule nationwide in suit brought by several plaintiffs in the instant matter). Rather, "district courts have the authority to issue universal relief keeping in mind the principle that such relief must be no more burdensome to defendants than necessary to provide complete relief to plaintiffs." *Saget*, 375 F. Supp. 3d at 378 (citing *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932); *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); and *Texas* v. *United States*, 809 F.3d 134, 188 (5th Cir. 2015)). Plaintiffs operate far beyond New York—for example, CLINIC has offices in 10 states and Mexico and its member organizations are in 49 states and the District of Columbia, Ex. 22, Wheeler Decl., ¶ 3—and

their clients may move to or have affected family members in other states. The Consular Rules involve generally applicable, "nationwide policy," not "case-by-case enforcement," *Saget*, 375 F. Supp. 3d at 379, and it would be irrational for different admissibility rules to apply in different judicial districts. Moreover, "an individual should not have to fear that [traveling to] one state [instead of] another" will make the difference between admissibility or inadmissibility. *See MRNY*, 2019 WL 5484638 at *13. A local injunction would create great confusion for consular officers on foreign soil, who would have to apply different rules depending on the state in which the applicants or their families live. Such an unworkable remedy is likely to invite arbitrary enforcement.

Finally, a nationwide injunction is particularly appropriate for an unlawful agency rule, because when such an action is "h[e]ld unlawful" and "set aside" under the APA, 5 U.S.C. § 706(2), "the ordinary result is that the rules are vacated—not that their application to individual petitioners is proscribed." *Nat'l Mining Ass'n* v. *U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon* v. *Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). This is particularly so were the agency has not engaged in the required notice-and-comment process. "Failure to provide the required notice and to invite public comment . . . is a fundamental flaw that normally requires vacatur of the rule." *Heartland Reg'l Med. Ctr.* v. *Sebelius*, 566 F.3d 193, 199 (D.C.Cir.2009). *See also In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 853 F. Supp. 2d 138, 144 (D.D.C. 2012), *aff'd*, 751 F.3d 629 (D.C. Cir. 2014).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court enter a preliminary injunction enjoining Defendants' (i) continued application of the FAM Revisions, (ii) adoption and implementation of the IFR as a final rule, and (iii) implementation of the Proclamation.

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