UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MAKE THE ROAD NEW YORK, *et al.*,

Plaintiffs,

v.

UR M. JADDOU, *et al.*,

Defendants.

No. 19-cv-07993 (GBD) (OTW)

OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT

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INTRODUCTION

The Court should deny Plaintiffs' Motion for Attorneys' Fees and Expenses Under the Equal Access to Justice Act ("Motion"), ECF No. 361, in its entirety. Plaintiffs are not eligible for an award of fees and expenses, first, because they are not prevailing parties. Although Plaintiffs secured two preliminary injunctions in this case, both of those injunctions were stayed by appellate courts. In an opinion Plaintiffs largely ignore, the Second Circuit recently explained that such a stay "necessarily undermines the district court's preliminary injunction decision" and renders the injunction a mere "transient" victory that does not confer prevailing party status. *Dimartile v. Hochul*, 80 F.4th 443, 452, 456 (2d Cir. 2023).

Furthermore, EAJA fees and expenses are available only if the position of the United States was not substantially justified. Here, the reasonableness of the government's position in this complex case that raised issues of first impression is established by the decisions of several other district and circuit judges agreeing with the arguments that the government advanced. The Supreme Court's stays of injunctions entered in this case and an analogous case, as well as its grant of certiorari, further show that Defendants' position was substantially justified. Likewise, an examination of the particular arguments raised by Defendants shows that those arguments were supported by authority and otherwise reasonable. Although the government has withdrawn the rule challenged in this case on the ground that it "caused undue fear and confusion," and that the current rule reflects "a more faithful interpretation" of the statutory text, 87 Fed. Reg. 55,472, 55,473 (2022), it nonetheless made reasonable arguments in defense of the lawfulness of the prior rule.

Defendants strongly disagree that any fees are appropriate here, but if the Court were to conclude otherwise, any fee award should be sharply reduced from the excessive amount claimed

by Plaintiffs. As discussed below, Plaintiffs' time records reveal numerous improper time entries and other deficiencies, which justify denial of Plaintiffs' fee request altogether or a substantial reduction of the requested amount.

BACKGROUND

Since 1882, federal law has prohibited the admission to the United States of noncitizens likely to become a public charge. The phrase "public charge," however, had never been defined by statute or regulation, until August 14, 2019, when the Department of Homeland Security ("DHS") published *Inadmissibility on Public Charge Grounds* (the "Rule") in the Federal Register. 84 Fed. Reg. 41,292. That Rule—which spanned nearly 200 pages—amended DHS regulations by prescribing how DHS would determine whether a noncitizen applying for admission or adjustment of status is inadmissible to the United States under the Immigration and Nationality Act, because he or she "is likely at any time to become a public charge[.]" 8 U.S.C. § 1182(a)(4)(A). The Rule included definitions of certain terms critical to the public charge determination, such as "public charge" and "public benefit," and explained the factors DHS would consider when making a public charge inadmissibility determination. DHS promulgated the Rule after first issuing a notice of proposed rulemaking in October 2018 and then spending ten months refining the Rule and responding to the 266,077 public comments received.

Plaintiffs filed this lawsuit challenging the Rule on August 27, 2019, after five similar lawsuits had already been filed in various district courts.[1] A total of nine lawsuits challenging the

[1] *See City & Cnty. of San Francisco v. USCIS*, No. 19-4717 (N.D. Cal.) (filed Aug. 13, 2019); *Washington v. DHS*, No. 19-5210 (E.D. Wash.) (filed Aug. 14, 2019); *California v. DHS*, No. 19-4975 (N.D. Cal.) (filed Aug. 16, 2019); *La Clinica de la Raza v. Trump*, No. 19-4980 (N.D. Cal.) (filed Aug. 16, 2019); *New York v. DHS*, No. 19-cv-7777 (S.D.N.Y.) (filed Aug. 20, 2019); *Make the Road New York v. Cuccinelli*, No. 19-cv-7993 (S.D.N.Y.) (filed Aug. 27, 2019).

Rule were ultimately filed.[2] Plaintiffs' complaint brought four claims that were similar to claims in the other cases. Plaintiffs contended (1) that the Rule was arbitrary and capricious, an abuse of discretion, and contrary to law, in violation of the Administrative Procedure Act ("APA"), Compl., ECF No. 1 ¶¶ 271-76 (Count One); (2) that the Rule was procedurally improper, in violation of the APA, *id.* ¶¶ 277-84 (Count Two); that DHS and USCIS lacked rulemaking authority to promulgate the Rule, *id.* ¶¶ 285-91 (Count Three); and that the Rule violated the equal protection and due process guarantees of the Fifth Amendment, *id.* ¶¶ 292-98 (Count Four).

On October 11, 2019, the Court granted Plaintiffs' motion for a nationwide preliminary injunction barring Defendants from implementing the Rule. ECF Nos. 146, 147. On January 27, 2020, the Supreme Court stayed that injunction in its entirety. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020).

District courts in the Fourth, Seventh, and Ninth Circuits also preliminarily enjoined the Rule's enforcement,[3] but those injunctions, too, were soon stayed. In the Ninth Circuit, a motions panel stayed the injunctions issued in that circuit in a lengthy published opinion. *City & County of San Francisco v. USCIS*, 944 F.3d 773, 799 (9th Cir. 2019). The Fourth Circuit similarly stayed a preliminary injunction issued by the District of Maryland. Order, *CASA de Md., Inc. v. Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019). The Seventh Circuit denied a stay, but the Supreme Court soon stayed the preliminary injunction issued in that circuit, as well. *See Wolf v. Cook Cty.*, 140 S. Ct. 681, 681 (2020). Accordingly, the Rule went into effect nationwide on February 24, 2020.

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[2] *See id.*; *see also CASA de Maryland, Inc. v. Trump*, No. 19-2715 (D. Md.) (filed Sept. 16, 2019); *Cook Cty. v. McAleenan*, No. 19-6334 (N.D. Ill.) (filed Sept. 23, 2019); *Mayor & City Council of Baltimore v. DHS*, No. 19-2851 (D. Md.) (filed Sept. 27, 2019).

[3] *See CASA de Md., Inc. v. Trump*, 414 F. Supp. 3d 760, 788 (D. Md. 2019); *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1014 (N.D. Ill. 2019); *City & Cty. of San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1073 (N.D. Cal. 2019); *Washington v. Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191, 1224 (E.D. Wash. 2019).

While this Court's first preliminary injunction was stayed, Plaintiffs moved for a new preliminary injunction, relying on the COVID-19 pandemic, and the Court granted that motion on July 29, 2020, issuing a nationwide injunction for the duration of the national emergency associated with the COVID-19 pandemic. *See New York v. U.S. Dep't of Homeland Sec.*, 475 F. Supp. 3d 208, 231 (S.D.N.Y. 2020). On the same date, the Court granted in part and denied in part Defendants' motion to dismiss. *Id*. The Court dismissed Count Three of the Complaint and allowed Counts One, Two, and Four to proceed. *Id*. at 217-23.

On August 4, 2020, the Second Circuit issued an opinion in the appeal of the first preliminary injunction. The Second Circuit agreed that a preliminary injunction was warranted but limited the scope of the injunction to New York, Connecticut, and Vermont. *See New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 88 (2d Cir. 2020). That preliminary injunction nevertheless remained stayed pursuant to the Supreme Court's January 27, 2020 Order.

On September 11, 2020, the Second Circuit granted the government's motion for a stay of the second preliminary injunction, holding that the government had "shown that it is likely to succeed on the merits" of the appeal. *See New York v. U.S. Dep't of Homeland Sec.*, 974 F.3d 210, 214 (2d Cir. 2020). Following the Second Circuit's stay, DHS promptly resumed implementation of the Rule.

When the Fourth, Seventh, and Ninth Circuit Courts decided the appeals of the preliminary injunctions issued in those circuits, the judges expressed differing views regarding the lawfulness of the Rule. A divided panel of the Fourth Circuit reversed the preliminary injunction issued by the District of Maryland, with the majority concluding that "the DHS Rule is unquestionably lawful." *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 251 (4th Cir. 2020), *rehearing en banc granted by* 981 F.3d 311 (4th Cir. 2020). A divided panel of the Seventh Circuit affirmed the

injunction issued by the Northern District of Illinois, with then-Judge Barrett dissenting and concluding that "DHS's definition is a reasonable interpretation of the statutory term 'public charge.'" *Cook Cty. v. Wolf*, 962 F.3d 208, 254 (7th Cir. 2020) (Barrett, J., dissenting). In the Ninth Circuit, too, the panel was divided. *See City & Cty. of S.F. v. USCIS*, 981 F.3d 742, 763 (9th Cir. 2020) (affirming injunctions but with a limited scope and over a dissent).

On November 2, 2020, the Northern District of Illinois entered a Rule 54(b) final judgment against the federal government and vacated the Rule. *Cook County v. Wolf*, 498 F. Supp. 3d 999 (N.D. Ill. 2020). That vacatur was soon stayed by the Seventh Circuit pending appeal. Order Granting Motion to Stay Judgment, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Nov. 19, 2020), ECF No. 21.

On February 22, 2021, the Supreme Court granted the government's petition for writ of certiorari seeking review of the Second Circuit's decision affirming in part this Court's first preliminary injunction. *Dep't of Homeland Sec. v. New York*, 141 S. Ct. 1370 (2021). On March 9, 2021, DHS issued a statement announcing that it had begun its review of DHS actions related to the implementation of the public charge ground of inadmissibility, as required by Executive Order 14,012.[4] It further explained that, as a result of that review, "DHS has determined that continuing to defend the [Rule], is neither in the public interest nor an efficient use of limited government resources" and that "the Department of Justice will no longer pursue appellate review of judicial decisions invalidating or enjoining enforcement of the 2019 Rule."[5] That same day, the parties filed a joint stipulation to dismiss the case in the Supreme Court, *see* Jt. Stip. to Dismiss, *Dep't of Homeland Sec. v. New York*, No. 20-449 (Mar. 9, 2021), and the Supreme Court dismissed

[4] Press Release, U.S. Dep't of Homeland Sec., DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility (Mar. 9, 2021), Decl. of Samuel Miller, Ex. 8, ECF No. 363-8.
[5] *Id*. (internal citation omitted).

the petition, *Dep't of Homeland Sec. v. New York*, 141 S. Ct. 1292 (2021).

Also on March 9, 2021, DHS moved to dismiss its appeal in the Seventh Circuit of the Northern District of Illinois's vacatur of the Rule.[6] On that day, the Seventh Circuit granted the motion to dismiss and issued the mandate, which caused the vacatur of the Rule to go into effect.[7] On March 15, 2021, DHS issued a final rule removing the vacated regulations.[8]

Pursuant to a series of orders entered beginning on March 11, 2021, *see* ECF Nos. 308, 319, 326, 335, 337, 339, 341, the litigation was stayed until March 3, 2023, when Plaintiffs filed a notice of voluntary dismissal, ECF No. 342.

LEGAL STANDARD

EAJA fees are available only to "prevailing part[ies.]" 28 U.S.C. § 2412(d)(1)(B). To "prevail," a plaintiff must satisfy at least two requirements. First, he or she must "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar v. Hobby*, 506 U.S. 103, 109 (1992). Second, a plaintiff prevails only "when actual relief on the merits . . . materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id*. at 111-12.

In addition, EAJA only allows an award of fees if "the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). Substantial justification is not a high bar: "Substantially justified" simply means "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

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[6] *See* Unopposed Motion to Voluntarily Dismiss Appeal, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. 23.

[7] Order Dismissing Appeal, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. 24-1; Notice of Issuance of Mandate, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. 24-2.

[8] Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021).

EAJA thus restricts fee awards to a fraction of the cases in which the non-government party prevails. This limitation aligns with EAJA's purposes, which "differ substantially from other fee-shifting statutes like [42 U.S.C.] § 1988." *SEC v. Price Waterhouse*, 41 F.3d 805, 809 (2d Cir. 1994). In contrast to § 1988, which is focused on allowing needy individuals to bring actions challenging civil rights violations, EAJA was "designed to compensate victims of unjustified litigation by the Government from some of the burdensome expenses and costs to which they were subjected by the Government's taking of unreasonable positions." *Id*. Congress limited EAJA awards to cases in which the Government's position was not "substantially justified" because its aim was "to furnish relief from . . . governmental litigation abuse." *Id*.; *see also Anthony v. Sullivan*, 982 F.2d 586, 588 (D.C. Cir. 1993) (characterizing EAJA as "somewhat stingier" than the fee provisions of Title VII). As explained in the House Report accompanying the relevant bill:

> The [substantial justification] standard . . . should not be read to raise a presumption that the government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the government to establish that its decision to litigate was based on a substantial probability of prevailing.

H. R. Rep. No. 96-1418 at 11, reprinted in 1980 U.S.C.C.A.N. 4984, 4990.

A finding that the government's position was not substantially justified is a threshold condition for an award of fees and costs under EAJA. *Comm'r, INS v. Jean*, 496 U.S. 154, 160 (1990). As with the question of whether the non-government party prevailed, the Court determines whether the government's position was substantially justified by looking at the case as a whole. *See id*. at 161-62; *see also Cohen v. Bowen*, 837 F.2d 582, 585 (2d Cir. 1988) ("In assessing the reasonableness of the Government's position, the court must examine the full course of litigation"); *Senville v. Madison*, 331 F. App'x 848, 850 (2d Cir. 2009) (summary order) (affirming denial of EAJA award and noting with approval that the district court had considered the agency's "overall" position).

Even if an EAJA movant establishes that it prevailed and the government's position was not substantially justified, the movant is only entitled to fees that are "reasonable." 28 U.S.C. § 2412(d)(2)(A); *see also* 28 U.S.C. § 1920 (allowing costs for transcripts and copies of materials only if "necessarily obtained for use in the case").

ARGUMENT

I. Plaintiffs Are Not Prevailing Parties

A. A Stayed Preliminary Injunction Does Not Confer Prevailing Party Status

Plaintiffs contend that they are prevailing parties based on this Court's first preliminary injunction in this case. Mot. at 7.[9] But that argument runs headlong into the Second Circuit's recent decision in *Dimartile v. Hochul*, 80 F.4th 443 (2d Cir. 2023), which Plaintiffs barely acknowledge. The plaintiffs in *Dimartile* secured a preliminary injunction, but the injunction "was insufficient to confer prevailing party status," given that it was soon stayed and then the case became moot. *Id*. at 445. As the Second Circuit explained, "'transient' victories—*i.e.*, those that are 'reversed, dissolved, or otherwise undone' by a later decision in the same case—will not suffice" to show a material alteration of the parties' relationship. *Id*. at 452 (quoting *Sole v. Wyner*, 551 U.S. 74, 83 (2007)).

As in *Dimartile*, the preliminary injunction that Plaintiffs here rely on to claim prevailing party status was stayed by a higher court—here, the Supreme Court. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020). That stay is significant for at least two reasons. First, it "necessarily undermines the district court's preliminary injunction decision" and "at least drew into question the district court's likelihood-of-success ruling." *Dimartile*, 80 F.4th at 456-57.

[9] Plaintiffs do not argue that the Court's second preliminary injunction in this case confers prevailing party status on them. Both the first and the second injunctions were stayed, and it is unclear why Plaintiffs believe one entitles them to fees while conceding that the other does not.

Second, it rendered the preliminary injunction a transient victory—and therefore insufficient to materially alter the parties' relationship "in a meaningful and enduring way." *Id*. at 452; *see also Doe v. Nixon*, 716 F.3d 1041, 1049 (8th Cir. 2013) ("Although the . . . preliminary injunction may have served as a court-ordered change in the parties' legal relationship, this change was never realized because of our stay of that order. Thus, the district court's . . . order effectively served as a judicial pronouncement without judicial relief and did not confer prevailing party status upon the [plaintiffs].").[10]

Dimartile also emphasized that the plaintiffs "fail[ed] to point to a single case in which a court determined that a preliminary injunction later stayed pending appeal could confer prevailing party status." 80 F.4th at 458. The same is true here, notwithstanding Plaintiffs' incorrect assertion that *HomeAway.com, Inc. v. City of New York*, 523 F. Supp. 3d 573 (S.D.N.Y. 2021) involved a "preliminary injunction which was later stayed," Mot. at 8. In fact, *HomeAway.com* involved a stay of the *litigation*, not a stay of the *injunction*. 523 F. Supp. 3d at 584 (explaining that the "preliminary injunction was in place for more than 18 months" and "ceased to be effective only when the City . . . adopted a narrowed ordinance"); Order, *HomeAway.com v. City of New York*, No. 18-7742 (S.D.N.Y. Feb. 13, 2020), ECF No. 119, attached as Exhibit A (staying case while noting that "the preliminary injunction issued by the Court . . . remains in place"). This Court

[10] The Supreme Court's stay eventually ended in March 2021, when the Supreme Court dismissed the writ of certiorari pursuant to the parties' joint stipulation. *See Dep't of Homeland Sec.*, 141 S. Ct. 1292. The expiration of the stay and the dismissal of the government's appeal do not make Plaintiffs prevailing parties. As discussed above, those actions resulted from a voluntary decision by the new administration not to pursue further discretionary review of the Northern District of Illinois's vacatur of the Rule. *See supra* at 5. It is well-established that a voluntary change in conduct "lacks the necessary judicial imprimatur on the change to warrant [the plaintiff] being a prevailing party for purposes of attorney's fees statutes." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res*., 532 U.S. 598, 605 (2001); *see also Ma v. Chertoff*, 547 F.3d 342, 344 (2d Cir. 2008) ("*Buckhannon*'s definition of 'prevailing party'" also "applies to fee requests under the EAJA").

should not be the first to find a stayed preliminary injunction sufficient to confer prevailing party status. For that reason alone, Plaintiffs' Motion should be denied.[11]

B. Plaintiffs Fail to Establish That They Are Eligible For Any Fee Award

In addition, Plaintiffs' Motion does not show that they are eligible to receive any fee award. An application for fees under EAJA must "show . . . that the party . . . is eligible to receive an award under this subsection," 28 U.S.C. § 2412(d)(1)(B). The requirement that the application "*show*" eligibility imposes a "proof burden on the fee applicant." *Scarborough v. Principi*, 541 U.S. 401, 414 (2004). Among other requirements, the application must show that the plaintiffs' number of employees is within the limits prescribed by 28 U.S.C. § 2412(d)(2)(B). A 501(c)(3) organization must have "not more than 500 employees at the time the civil action was filed." *Id.* § 2412(d)(2)(B)(ii).

Plaintiffs have not submitted any evidence that any Plaintiff met these requirements at the time they filed suit, and available evidence in fact shows that Plaintiff Catholic Charities Community Services ("CCCS-NY") did not meet the criteria. In an Internal Revenue Service filing for 2019, CCCS-NY reported that it had 1,049 employees. Exhibit B, Cath. Charities Cmty. Servs., Return of Organization Exempt from Income Tax (Form 990) at 1 (Apr. 21, 2021), https://apps.irs.gov/pub/epostcard/cor/135562185_202008_990_20210427180163 52.pdf.

Plaintiffs' failure to carry their evidentiary burden of establishing eligibility warrants denial of the fee request in its entirety. At the very least, CCCS-NY should be excluded from any award of fees, and the total amount of any fee award should be proportionately reduced. In the Second Circuit, when eligible plaintiffs join ineligible plaintiffs in a lawsuit, the court must "determine the

[11] Plaintiffs implicitly acknowledge that their efforts to enjoin the Rule were ultimately unsuccessful because they do not to seek reimbursement for time spent litigating the stay in the Supreme Court. Mot. at 21. By the same token, they cannot be considered prevailing parties based only on their initial—fleeting—success in seeking to enjoin the Rule.

number of eligible plaintiffs and [if a fee award is otherwise justified] award fees based on the ratio of eligible plaintiffs to total plaintiffs." *Sierra Club v. U.S. Army Corps of Eng'rs*, 776 F.2d 383, 393–94 (2d Cir. 1985). The court computes the ratio based strictly on a headcount of the plaintiffs; it does not consider which plaintiffs submitted or joined a fee application. *See id.* at 393 n.8. Exclusion of CCCS-NY would equate to a 20 percent reduction of the fee amount.

II. Plaintiffs Are Not Entitled to Fees and Costs Because the Government's Position Was Substantially Justified

A. The Government's Position Was Substantially Justified, as Indicated by Numerous Favorable Judicial Decisions

EAJA allows an award of attorney's fees only if "the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). Under that standard, so long as the government's position "could satisfy a reasonable person," the fee request must be denied. *Pierce*, 487 U.S. at 565. Courts may consider objective indicia that the government's position was substantially justified, including "the views expressed by other courts on the merits of the Government's position." *See id*. at 568-69. A "string of losses can be indicative; and even more so a string of successes" by the government. *Id*. at 569.

Here, the inquiry yields a straightforward answer, for several courts and jurists adopted Defendants' position. *See CASA de Md., Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020), *rehearing en banc granted by* 981 F.3d 311 (4th Cir. 2020); *City & Cty. of San Francisco. v. USCIS*, 981 F.3d 742, 763 (9th Cir. 2020) (VanDyke, J., dissenting); *Cook Cty. v. Wolf*, 962 F.3d 208, 234 (7th Cir. 2020) (Barrett, J., dissenting); *City and Cty. of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). In addition, the fact that a majority of the Justices of the Supreme Court believed that Defendants' position was at least reasonable is "implied by the Supreme Court's multiple stays" of preliminary injunctions issued against the Rule, including an injunction issued in this case. *San Francisco*, 981 F.3d at 763-64 (VanDyke, J., dissenting). The Supreme Court's later grant of

certiorari further supports the reasonableness of Defendants' position. *See Est. of Merchant v. Comm'r*, 947 F.2d 1390, 1394 (9th Cir. 1991) (government's position was reasonable where the Supreme Court thought it was "debatable enough to justify a grant of certiorari and briefing and argument"). Regardless of who is right and who is wrong on these questions, under these circumstances, it is undeniable that "a reasonable person could"—and indeed did—"think [Defendants' position] correct[.]" *Pierce*, 487 U.S. at 566 n.2.

The principle that "a string of successes" will support finding the government's position substantially justified applies with particular force here given the unequivocal nature of the rulings that DHS has wide discretion to interpret the public charge inadmissibility statute and that, given that wide discretion, the Rule reflected a permissible interpretation. Judges Niemeyer and Wilkinson, for example, determined that "the DHS Rule is unquestionably lawful." *CASA de Md.*, 971 F.3d at 251. In ruling for the government, they stated that the case did not present "a close question[.]" *Id*. at 250. In their view, "the text, purpose, and structure of the INA make clear that the DHS Rule is premised on a permissible construction of the term 'public charge.' To hold otherwise is a serious error in statutory interpretation." *Id*. at 250; *see also id*. at 242 (stating that it was "clear" that "the DHS Rule is a lawful one"); *id*. at 255 (stating the answer to the question of whether DHS could have used its authority as it did "is clearly yes").

Similarly, when the Ninth Circuit stayed preliminary injunctions issued by district courts within that circuit, the majority concluded in a published opinion that the Rule "easily satisfies" *Chevron* step two and was "not arbitrary or capricious." *San Francisco*, 944 F.3d at 790, 799.[12] And when the Seventh Circuit considered these issues, then-Judge Barrett concluded that "DHS's

[12] When a Ninth Circuit merits panel later affirmed district court preliminary injunctions of the Rule, Judge Van Dyke dissented, further showing that reasonable minds can disagree about the lawfulness of the Rule. *See San Francisco*, 981 F.3d at 763-64 (VanDyke, J., dissenting).

definition is a reasonable interpretation of the statutory term 'public charge.'" *Cook Cty.*, 962 F.3d at 254 (Barrett, J., dissenting). Given the several judges who emphatically agreed with positions that were advanced by Defendants in this case, those positions were plainly substantially justified.

Thus, the litigation history resolves the question of fee entitlement here, because "the existence of several dissenting opinions is particularly persuasive evidence of substantial justification[.]" *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig*., 751 F.3d 629, 636 (D.C. Cir. 2014); *see also Smith ex rel. Smith v. Bowen*, 867 F.2d 731, 735 (2d Cir. 1989) (finding the government's position substantially justified in part because "[t]he underlying agency determination action rested on regulations that have been adjudged valid in at least two other circuits"); *Griffith v. Comm'r of Soc. Sec.*, 987 F.3d 556, 571 (6th Cir. 2021) ("While the presence of a dissent may not always demonstrate that the government's position was substantially justified, the deliberate and thoughtful nature of Judge Rogers's reasoning signals that reasonable minds could disagree on these issues."); *United States v. Paisley*, 957 F.2d 1161, 1167 (4th Cir. 1992) (district court abused its discretion where it "accorded no weight to the cogency of the reasoning by which two circuit judges of this court had concluded that the Government's position was not only justified, but was legally correct"); *League of Women Voters of Cal. v. FCC*, 798 F.2d 1255, 1260 (9th Cir. 1986) (finding government's position substantially justified when "[t]he constitutionality of the amended statute is a question upon which reasonable minds could differ, as evidenced by the five-four division in the Supreme Court"); *Am. Ass'n of Pol. Consultants, Inc. v. Wilkinson*, 518 F. Supp. 3d 881, 890 (E.D.N.C. 2021) (the government's position was "substantially justified" when "[c]onsidering the totality of the circumstances," including "the support found in" the opinions of other justices and judges).

Faced with the decisions of several judges who agreed with Defendants, Plaintiffs insist that those judges did not analyze "the same legal claims that underpinned Plaintiffs' success here," Mot. at 13, but that assertion does not withstand the briefest scrutiny. First, Plaintiffs are incorrect in asserting that "most" of the other judges "did *not* address the APA claim whatsoever," that there was an "absence of any APA analysis" in the Fourth Circuit opinion ruling for the government, and that "Judge Barrett did not express a dissenting opinion on the merits of the APA claim upon which Plaintiffs here actually prevailed." Mot. at 13, 15. In fact, favorable opinions by the Fourth and Ninth Circuits and Judge Barrett's dissent each addressed the APA claim that the Rule was contrary to the INA, which was Plaintiffs' core claim in this case and the overwhelming focus of the Second Circuit's preliminary injunction opinion. *See CASA de Md.*, 971 F.3d at 241-55; *San Francisco*, 944 F.3d at 790-99; *Cook Cty.*, 962 F.3d at 235-54 (Barrett, J., dissenting). As to the procedural APA claim alleging that the Rule was issued in an arbitrary and capricious manner, that claim was addressed at length by a Ninth Circuit motions panel, which ruled for Defendants in a published opinion. *San Francisco*, 944 F.3d at 805.

Second, Plaintiffs' argument ignores the Supreme Court's stay of the first preliminary injunction in this case, which is a particularly significant objective indicator of reasonableness. Under Second Circuit precedent, that stay "necessarily undermines the district court's preliminary injunction decision," *Dimartile*, 80 F.4th at 456, including the rulings on Plaintiffs' substantive and procedural APA claims and the equal protection claim, all of which Plaintiffs unsuccessfully argued to the Supreme Court as reasons to deny the government's requested stay. *See* Opp'n to

Appl. for a Stay of the Injunctions Issued by the U.S. Dist. Ct. for S.D.N.Y., *DHS v. Make the Rd. N.Y.*, No. 19A785, at 22-33 (U.S. Jan. 22, 2020).[13]

Third, by seeking to isolate particular claims, Plaintiffs' argument violates the Supreme Court's instruction that, in evaluating whether the government's position was substantially justified, "only one threshold determination for the entire civil action is to be made." *Jean*, 496 U.S. at 159; *id*. at 161-62 (EAJA "favors treating a case as an inclusive whole, rather than as atomized line-items"). The holistic approach under *Jean* does not mean "that every argument made by [the government] must be substantially justified" (even though, here, all of the government's arguments were substantially justified). *Hanover Potato Products Inc. v. Shalala*, 989 F.2d 123, 131 (3d Cir. 1993). Instead, it means that courts "must evaluate every significant argument made by [the government]" "to determine if the argument is substantially justified," and then conclude "whether, *as a whole*, the Government's position was substantially justified." *Id*.

In sum, reasonable judges and Justices have had varying opinions over the years about the issues that were litigated in this case. But under the American Rule, "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242, 252-53 (2010). No exception to that "bedrock principle" applies here, *id*., because Plaintiffs cannot show that "the position of the United States was not substantially justified," 28 U.S.C. § 2412(d)(1)(B). Accordingly, Plaintiffs' fee motion can and should be denied, in its entirety, for that reason alone.

[13] Available at https://www.supremecourt.gov/DocketPDF/19/19A785/129503/20200122143103275_Opposition%20to%20Stay.pdf.

B. The Merits of the Government's Position Were Substantially Justified

An evaluation of the merits of Defendants' position further confirms that it was substantially justified. As noted above, Plaintiffs' complaint alleged four claims. Defendants prevailed on one of those claims, when the Court dismissed Count Three in agreement with Defendants' argument that the Secretary of Homeland Security had the authority to issue the Rule. *See* Mem. Decision & Order, ECF No. 221, at 16-17.[14] As to the remainder of Plaintiffs' claims, Defendants raised reasonable arguments in response to each of them, in the government's briefing before this Court, the Second Circuit, and the Supreme Court.

1. Defendants Reasonably Argued that the Rule's Definition of "Public Charge" Was Consistent with the INA

The primary claim in this case—which was the focus of the parties' briefing and the various opinions—was Plaintiffs' claim that the Rule was contrary to the INA. That claim turned on a question of statutory interpretation requiring an analysis of almost 140 years of statutes, cases, legislative history, and administrative materials, all within the context of the "notoriously complex" INA. *Cook Cty.* 962 F.3d at 243 (Barrett, J., dissenting); *see also Islam v. Sec'y, Dep't of Homeland Sec.*, 997 F.3d 1333, 1339 (11th Cir. 2021) ("The INA is a complex statutory scheme"); *Wolfchild v. Redwood Cty.*, 824 F.3d 761, 765 (8th Cir. 2016) (concluding that issues were complex in part because they required "interpretation of over 150-year-old statutes, regulations, and legislative history . . . and a complicated area of the law"); *see also* Hurwitz Decl., ECF No. 366, ¶ 15 (Plaintiffs' counsel conceding that this case involved "over 100 years of complex rule-making history" and many "complex questions"). That complexity supports the

[14] Notwithstanding the dismissal of Count Three, the Declaration of Baher Azmy insists that Plaintiffs "prevailed against Defendants on all of the claims in this suit[.]" ECF No. 364 ¶ 10.

reasonableness of Defendants' position. *See Johnson v. Commr. of Soc. Sec.*, 64 F. Supp. 2d 55, 58 (D. Conn. 1999) (government's position was substantially justified where case was complex).

Moreover, at the outset of this lawsuit, there were no rulings of any court interpreting the lawfulness of the Rule, much less any "settled law" precluding Defendants' arguments. *See Vacchio v. Ashcroft*, 404 F.3d 663, 675 (2d Cir. 2005) ("the issue is far from settled law, the Government's legal argument is far from unreasonable, and it thus cannot be said that the Government's position on the question is not substantially justified"). An "award of EAJA fees is not warranted . . . where the question of whether [a statute] was ambiguous . . . was one of first impression among the courts of appeals[.]" *Saysana v. Gillen*, 614 F.3d 1, 6 (1st Cir. 2010). In such a situation, it is "appropriate for the government to seek specific instruction from the court on th[is] issue." *Id.*; *see also Taucher v. Brown-Hruska*, 396 F.3d 1168, 1174 (D.C. Cir. 2005) (suggesting that government is substantially justified if they "lost because an unsettled question was resolved unfavorably"); *Alexander v. Becerra*, 2023 U.S. Dist. LEXIS 15824, at *10-11 (D. Conn. Jan. 31, 2023) (government's position was substantially justified where "[t]here was no case law anywhere in the country, let alone within the Second Circuit, that addressed an issue that was reasonably close to the one on which this case ultimately hinged").

As the litigation progressed and other courts handling similar suits issued rulings favorable to the government, Defendants reasonably relied on those rulings in presenting their arguments in this case. For example, Defendants' motion to dismiss in this case cited the favorable stay opinion by the Ninth Circuit, which was the only appellate court opinion to address the lawfulness of the Rule at that point. *See* Mem. of Law in Supp. of Mot. to Dismiss ("MTD"), ECF No. 177, at 13. Defendants also relied on favorable opinions by multiple Courts of Appeals to successfully petition the Supreme Court to grant certiorari in this case. *See generally* Petition for a Writ of Certiorari

("Cert Petition"), *DHS v. New York*, No. 20-449 (Oct. 7, 2020).[15]

Plaintiffs state that Defendants' position on the statutory interpretation issue "was plainly unreasonable," but they never say which specific arguments supposedly were unreasonable or why. Mot. at 9. In defending against Plaintiffs' claim that the Rule was contrary to the INA, Defendants reasonably argued that the Rule was consistent with the statutory terms and the discretion afforded to DHS under the statute. As support, Defendants cited, *inter alia*, dictionaries, administrative interpretations, and documents dating to the nineteenth century when Congress enacted the first public charge inadmissibility statute. *See* Mem. of Law in Opp'n to Pls' Mot. for a Prelim. Inj. ("PI Opp'n"), ECF No. 129, at 11-15.[16] Relying on some of the same sources, several judges agreed with Defendants' arguments that the Rule represented a permissible exercise of discretion to interpret the term "public charge." *See, e.g., CASA de Md.*, 971 F.3d at 242, 246; *San Francisco*, 944 F.3d at 792-99; *Cook Cty.*, 962 F.3d at 238-42 (Barrett, J., dissenting).

Defendants also argued that other provisions of the INA as well as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") supported a conclusion that the Rule's definition of "public charge" was a permissible exercise of the agency's discretion. MTD at 13-15, 17. Those arguments, too, were reasonable. *See, e.g., CASA de Md.*, 971 F.3d at 243-44, 250 (agreeing with those arguments); *San Francisco*, 944 F.3d at 799 ("PRWORA thus lends support to DHS's interpretation of the INA."). Even the Seventh Circuit majority, which ruled for the plaintiffs in that case, found these provisions to be "susceptible to more than one reasonable reading." *Cook Cty.*, 962 F.3d at 222.

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[15] https://www.supremecourt.gov/DocketPDF/20/20-449/157110/20201007163010954_2020-10-07%20-%20DHS%20v.%20New%20York%20Petition.pdf.

[16] Throughout this brief, Defendants cite to arguments made in their preliminary injunction opposition, but Defendants made similar arguments in other briefs filed in this case, including their motion to dismiss and briefs before the Second Circuit and the Supreme Court.

In short, Defendants had a reasonable basis to contend that the Rule was consistent with the INA. Defendants' position on that core issue was substantially justified.

2. Defendants Reasonably Argued that the Rule's Definition of "Public Charge" Was Consistent with the Rehabilitation Act

Defendants also presented reasonable arguments that the Rule was consistent with the Rehabilitation Act. The INA requires the government to consider "health," among other factors, when making public charge inadmissibility determinations. *See* 8 U.S.C. § 1182(a)(4)(B). "Health" can be reasonably understood to include a disability, and on that understanding the INA itself required DHS to take this factor into account. *See* PI Opp'n at 21-22. Moreover, Defendants explained that an individual who is likely to become a public charge because of a medical condition, following a determination based on the totality of the circumstances, is not "otherwise qualified" for admission or adjustment of status because he or she cannot "meet all of a program's requirements in spite of his [or her] handicap." *See id.* (quoting *St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 173 (2d Cir. 2001)).

Although this Court ruled that Plaintiffs had "raised at least a colorable argument that the Rule to be applied may violate the Rehabilitation Act," ECF No. 147, at 20, other courts agreed with Defendants. *See San Francisco*, 944 F.3d at 800 ("DHS has shown a strong likelihood that the Final Rule does not violate the Rehabilitation Act."); *California v. DHS*, 476 F. Supp. 3d 994, 1015 (N.D. Cal. 2020) (dismissing Rehabilitation Act claim); *San Francisco*, 408 F. Supp. 3d at 1103 (granting the plaintiffs' motion for preliminary injunction on other grounds but stating that "plaintiffs have not demonstrated even serious questions going the merits with respect to [the Rehabilitation Act] claim."). Notably, in September 2022, DHS issued a new final rule implementing public charge inadmissibility, and that new rule *also* considers disability as one potentially relevant factor. *See* 87 Fed. Reg. 55,472, 55,547 ("Consistent with the statute, DHS

declines to exclude consideration of an applicant's disability as part of the health factor in the totality of the circumstances.").[17]

3. Defendants Reasonably Argued that the Rule Was Not Arbitrary or Capricious

Plaintiffs raised a host of arguments in support of their claim that the Rule was arbitrary and capricious under the APA, *see* ECF No. 39, at 24-31, and Defendants presented reasonable responses thereto. For example, in response to Plaintiffs' argument that the Rule was vague and provided insufficient guidance for making public charge inadmissibility determinations, Defendants explained that the statute requires DHS to consider, at a minimum, eight specified elements but provides no further guidance. PI Opp'n at 26. The Rule's totality of the circumstances test provided *additional* information to DHS officers to guide their consideration, thus undercutting Plaintiffs' vagueness arguments. *Id*. Neither this Court nor the Second Circuit ruled on this issue, and the only court to do so agreed with Defendants. *See San Francisco*, 408 F. Supp. 3d at 1112-13 (plaintiffs had not demonstrated even serious questions as to claim that the Rule utilized a vague and unpredictable framework).

Defendants also reasonably argued that DHS had adequately responded during the rulemaking process to public comments about potential harms resulting from the Rule, explaining that DHS considered those harms and found them insufficient to overcome the policy objective that would be furthered by the Rule. PI Opp'n at 27-30. This issue was not decided by this Court or the Second Circuit, and the Ninth Circuit's stay decision agreed with Defendants' position. *See San Francisco*, 944 F.3d at 804 ("it was sufficient—and not arbitrary and capricious—for DHS to

[17] Plaintiff Make the Road New York trumpeted the new rule as a "VICTORY!" *See* Public Charge Update, available at https://maketheroadny.org/health-know-your-rights/.

consider whether, in the long term, the overall benefits of its policy change will outweigh the costs of retaining the current policy").

Finally, Defendants' argument that DHS adequately justified its policy change was also reasonable. As the Supreme Court has explained, there is "no basis in the Administrative Procedure Act . . . for a requirement . . . [of] more searching review" when an agency changes its position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). All that is required is for the agency to acknowledge the policy change, provide a reasoned explanation for the change, and explain how it believes the new interpretation is reasonable. *Id*. at 514-16. Defendants described in detail why they believed DHS met that legal standard, PI Opp'n at 30-32, and no authority foreclosed Defendants' arguments. On the contrary, the Ninth Circuit's stay decision agreed with Defendants' arguments and concluded that DHS showed a strong likelihood of success on the merits of the claim that the Rule was arbitrary and capricious. *See San Francisco*, 944 F.3d at 805 ("DHS has adequately explained the reasons for the Final Rule"). It was certainly reasonable for Defendants to present arguments that had already been accepted by a federal circuit court. *See, e.g.*, MTD at 34.

4. Defendants Reasonably Argued that the Rule Did Not Violate Equal Protection

Defendants also had reasonable grounds to defend against Plaintiffs' equal protection claim. The primary basis for that claim—which Plaintiffs had relegated to a few pages at the end of their preliminary injunction motion—was a set of alleged public statements mostly by non-DHS officials that had no express connection to the Rule, which Plaintiffs alleged showed discriminatory animus. ECF No. 39, at 33-34. Defendants reasonably argued that those statements did not suggest any equal protection violation, either under the heightened legal standard described in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) or the lower standard identified by Plaintiffs. PI Opp'n

at 34-36; MTD at 42-45. Defendants' position was reasonable; indeed a Supreme Court plurality later found similar allegations insufficient to support a valid equal protection claim. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (finding similar statements not probative in equal protection challenge to DACA rescission and ruling that claim must be dismissed). Plaintiffs also argued that the Rule would have a disparate impact on non-white immigrants, but Defendants noted that Plaintiffs' own-cited authority held that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact[.]" PI Opp'n at 35.

In arguing that Defendants' position on the equal protection claim was not substantially justified, Plaintiffs never explain what arguments were supposedly unreasonable or why. Plaintiffs also misstate the record. They incorrectly claim that there was a "finding of intentional and unconstitutional discrimination[.]" Mot. at 17. That is false—there has been no such finding by this Court, or any court. Instead, the Court's rulings as to the equal protection claim were that Plaintiffs demonstrated a likelihood of success on the merits and that the claim survived Defendants' motion to dismiss. Those preliminary rulings on the basis of allegations in the complaint could not possibly foreclose Defendants from asserting a reasonable defense to the claim. In other words, those initial rulings did not disprove Defendants' position that the Rule was promulgated without any improper animus. Plaintiffs cite no decision awarding EAJA fees based only on allegations of discrimination that were never proven or even tested with discovery.

Plaintiffs also contend that "[n]ot a single judge in the country" has "agreed" with Defendants' position on the equal protection claim. Mot. at 16. Plaintiffs again have the facts wrong. The Northern District of California dismissed equal protection challenges to the Rule in two cases, finding the plaintiffs' allegations of disparate impact and statements by government

officials insufficient to state a claim. *See California*, 476 F. Supp. 3d at 1017-26; *La Clinica De La Raza v. Trump*, No. 2020 U.S. Dist. LEXIS 221663, at *50-64 (N.D. Cal. Nov. 25, 2020). Plaintiffs also ignore the fact that a majority of the Justices of the Supreme Court necessarily concluded that Defendants' position on the equal protection claim was reasonable when they stayed the first preliminary injunction. *See Dimartile*, 80 F.4th at 456; *San Francisco*, 981 F.3d at 763-64 (VanDyke, J., dissenting). Thus, Plaintiffs' assertion that "no judge in any comparator case has provided any indication that the government's position on Equal Protection was reasonable," Mot. at 17, is demonstrably incorrect. Moreover, no other court relied on an equal protection claim as the basis for a preliminary injunction of the Rule.

In sum, each of Defendants' arguments was at least reasonable and was supported by numerous citations to appropriate authorities, often including decisions by courts that agreed with the government's position. Taken as a whole, the government's defense of the Rule cannot be said to lack substantial justification.

C. Plaintiffs' Remaining Arguments Fail

Plaintiffs' primary argument regarding substantial justification is that the preliminary rulings on the merits "direct the result" on the fee question. Mot. at 9. But the fact that this Court and the Second Circuit disagreed with some of Defendants' arguments does not show that those arguments were unreasonable, nor does it even raise a presumption that Defendants' position was not substantially justified. The Supreme Court has explained that "Congress did not . . . want the 'substantially justified' standard to 'be read to raise a presumption that the Government position was not substantially justified simply because it lost the case,'" or, as here, because the Court disagreed with some of the government's arguments. *Scarborough*, 541 U.S. at 415; *see also Cohen*, 837 F.2d at 585. In other words, the inquiry into the reasonableness of Defendants'

position "may not be collapsed into [the Court's] antecedent evaluation of the merits, for EAJA sets forth a 'distinct legal standard.'" *Cooper v. U.S. R.R. Ret. Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994).

Equally meritless is Plaintiffs' argument that Defendants' position was necessarily unjustified because the Court found the Rule likely arbitrary and capricious. Mot. at 9-11. "[A] finding in the merits phase that the Government's underlying action was 'arbitrary and capricious' within the meaning of the [APA] does not compel an award of fees." *FEC v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986). This is because Congress created "in EAJA a distinct legal standard – 'substantially justified'" and "the court entertaining an EAJA application is obliged to reexamine the facts under" that standard instead of "blithely reach[ing] for easy answers suggested by evocative labels." *Id*. at 1089; *see also Andrew v. Bowen*, 837 F.2d 875, 878 (9th Cir. 1988) (For purposes of EAJA fees, "arbitrary and capricious conduct is not per se unreasonable").

"[W]hether agency action invalidated as arbitrary and capricious might nevertheless have been substantially justified depends on what precisely the court meant by 'arbitrary and capricious.'" *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 595 (D.C. Cir. 1996). A "determination that an agency acted arbitrarily and capriciously because it failed to provide an adequate explanation . . . 'may not warrant a finding that [the] agency's action lacked substantial justification.'" *Id*. That is the situation here. As to the claim that the Rule was arbitrary and capricious, the Court ruled that DHS failed to provide a "reasonable explanation" for certain aspects of the Rule, ECF No. 147, at 16-19, and the Second Circuit likewise found that DHS did not provide a "satisfactory explanation" for its actions, *New York*, 969 F.3d at 81. Those rulings do not mandate the conclusion that Defendants lacked any substantial justification for arguing otherwise in this litigation.

On this issue, Plaintiffs cite *FEC v. Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993), but that case is far afield from this situation. In *Political Contributions*, the court limited its holding to "this unusual situation where a previous panel has specifically passed on every question before us, and has found the [government's] position to have been unreasonable in that it frustrated the intent of Congress and might jeopardize first amendment rights[.]" *Id*. at 387. In contrast, here, this Court and the Second Circuit ruled at a preliminary stage in the case that Plaintiffs were likely to succeed on certain of their claims, but did not make any final findings, much less any final finding of unreasonableness. Moreover, in *CFTC v. Dunn*, 169 F.3d 785, 787 (2d Cir. 1999), the Second Circuit rejected the argument that *Political Contributions* precluded a finding of substantial justification based on a prior adverse merits ruling. In *Dunn*, the Supreme Court had unanimously ruled that it was "plain as a matter of ordinary meaning" that the government's statutory interpretation was wrong and would fail *Chevron* Step One. *See Dunn v. CFTC*, 519 U.S. 465, 471, 479 n.14 (1997). Yet, the Second Circuit still found that the Supreme Court's ruling did not resolve the EAJA question. Furthermore, *Political Contributions* did not involve a stay of the adverse merits ruling or a series of decisions by federal judges agreeing with the position of the defendants, both of which are present here and compel the conclusion that Defendants' position was substantially justified.

Lastly, the fact that DHS considers the Rule's replacement to reflect a "more faithful interpretation" of the public charge inadmissibility statute does not suggest that the government's defense of the Rule lacked a substantial justification. Mot. at 11-12. In the preamble to the replacement rule, DHS reaffirmed that "the meaning of the term 'public charge' is ambiguous, that it has evolved over time, and that Congress granted wide discretion to the Executive Branch to interpret that term." 87 Fed. Reg. at 55,499. The fact that the current rule involves a better

interpretation of the statute does not mean that there was no substantial justification for defending the 2019 Rule's interpretation.

III. If the Court Awards any Fees, the Requested Fees Should be Sharply Reduced

Although any fee award here would contravene the numerous authorities and legal principles discussed above, if the Court does award fees, they should be well below the requested amount. First, Plaintiffs have failed to meet their burden to provide sufficient detail to enable the Court "to determine with a high degree of certainty that [the claimed] hours were actually and reasonably expended." *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004). Plaintiffs' time records contain countless entries with vague and conclusory descriptions such as "Meeting: Team meeting," "lit team call," "TC with GS," "tc with JVH," "team call," "team meeting," "entered time," "Attention to emails," "Read BIA cases," "Weekly team meeting," "Steering committee call," "Client calls," "Prepare for call," "2c decision," "Research re: reply brief," "Attention to scheduling issues," "PIF Call," "National coordinating call," "Call w/ co counsel," "Case reading," "Work on complaint," "Attention to to-do list," "Call with AAF," and "Expert call," to name just some examples. Such descriptions are insufficient to allow the Court to find that they reflect compensable time reasonably incurred in the litigation. *See Role Models*, 353 F.3d at 971 (entry stating "research and writing for appellate brief" was "inadequate to meet a fee applicant's heavy obligation to present well-documented claims"); *R.F.M. v. Nielsen*, 2020 U.S. Dist. LEXIS 79915, at *17 (S.D.N.Y. May 4, 2020) ("Vague time entries are those with work identified in 'mere generalities,' *e.g.* 'review [ ] facts,' 'work on [ ] issue,' 'review research'"); *Clark v. District of Columbia*, 674 F. Supp. 2d 149, 158-59 (D.D.C. 2008) (entries such as "preparation for hearing" and "preparation for telephone conference" lack sufficient detail); *Cabrera v. Fischler*, 814 F. Supp. 269, 289-90 (E.D.N.Y. 1993), *aff'd in part, remanded in part on other grounds*, 24 F.3d 372 (2d Cir. 1994) (entries such as "staff meeting" and "talk

w/SAP,Bove, P.Spiro," justified 30% reduction in lodestar); *Weinberger v. Great Northern Nekoosa Corp*., 801 F. Supp. 804, 829 (D. Me. 1992) ("The Court will disallow hours for such activities as 'research,' 'attention to matter,' 'draft letter,' and 'strategize' in the absence of more detailed time entries").

Second, Plaintiffs' time records appear to contain numerous entries relating to work performed for *other lawsuits*. For example, Plaintiffs included time for "drafting a FOIA complaint for MRNY re: Public Charge," ECF No. 364-1 (Thomas entry dated 12/12/2018), "researching the venue rules in SDNY for the MRNY FOIA Complaint," *id*., (Thomas entry dated 7/30/2019), and various other tasks associated with that FOIA case, *e.g., id*. (Thomas entries dated 12/13/2018, 12/14/2018, 12/17/2018, 12/28/2018, 12/31/2018, 1/3/2019, 1/4/2019, 1/22/2019, 4/18/2019, 4/19/2019, 4/23/2019, 5/3/2019, 5/72019, 5/8/2019, 5/15/2019, 6/7/2019, 6/11/2019, Schwarz entries dated 7/9/2019, 7/15/2019, 7/16/2019). Those entries appear to relate to a FOIA lawsuit that Plaintiff Make the Road New York filed in August 2019, *see Make the Road N.Y. v. DHS et al.*, No. 19-4607 (E.D.N.Y.). Still other entries appear to relate to Plaintiffs' separate lawsuit against the State Department, *Make the Road N.Y. v. Blinken*, No. 19-11633 (S.D.N.Y.), *see, e.g.*, ECF No. 364-1 (Thomas entries dated 10/23/2019-10/25/2019, Schwarz entry dated 10/21/2019), and another, unidentified lawsuit, *see id*. (Thomas entry dated 3/12/2019 ("Researching the local rule, which the HOA made its request for an extension. 7.1(d)(5)")). That work is not compensable in this lawsuit. *See Hensley v. Eckerhardt*, 461 U.S. 424, 433 (1983) (only time "reasonably expended on the litigation" is compensable).

Third, several entries record time spent recruiting plaintiffs to the litigation and preparing retainer agreements.[18] Attorneys cannot reasonably bill clients for time spent seeking out other clients, and "[h]ours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." *Hensley*, 461 U.S. at 434; *see also Role Models*, 353 F.3d at 973 ("government should not have to pay for administrative matters relating to the formal relationship between [the plaintiff] and its attorneys").

Fourth, although this lawsuit was filed in August 2019, Plaintiffs' counsel's time records include tasks performed as far back as October 2018—long before the Rule was issued and apparently even before most of the Plaintiffs had retained counsel. That pre-litigation work was far too disconnected from the lawsuit to have been "reasonably expended on the litigation," *Hensley*, 461 U.S. at 433. For example, several pre-litigation time entries appear to relate to the submission of comments to DHS during the rulemaking process. *See, e.g.*, ECF No. 365-1 (Welber entries dated 10/12/2018, 10/18/2018, 10/24/2018, 10/26/2018). Plaintiffs also seek compensation for counsel attending a "City-wide meeting to discuss NPRM and the impact it could have on low-income new yorkers" ten months before this case was even filed. *Id*. (Welber entry dated 10/18/2018). Those activities were far too removed from this case to be compensable.[19]

[18] *See, e.g.*, ECF No. 364-1 (Thomas entries dated 8/20/2019, 8/22/2019, Schwarz entry dated 5/20/2019); ECF No. 365-1 (Welber entries dated 12/17/2018, 1/11/2019, 3/21/2019, 3/27/2019, 4/5/2019, 4/18/2019, 5/6/2019, 5/20/2019, 5/24/2019, 6/5/2019, 6/25/2019, 7/3/2019, 7/15/2019, 7/16/2019, 7/17/2019, 8/7/2019, 8/19/2019, 8/20/2019, 8/21/2019, 8/22/2019, 8/23/2019); ECF No. 366-1 (Bowles entries dated 7/23/2019, 7/25/2019, 7/30/2019, 7/31/2019).

[19] Plaintiffs' fee motion incorrectly states that it "is based on a reasonable number of hours billed in the case *from 2019* to its conclusion in 2021," Mot. at 19 (emphasis added), suggesting that even Plaintiffs' counsel recognize that they should not recover for work performed in 2018. *See also* Azmy Decl., ECF No. 364 ¶¶ 9-10 (stating that "CCR attorneys began working on this matter in *October 2019*" and that the fee request "includes fees in connection with work performed from *October 2019* until November 2021") (emphasis added).

Fifth, any fee award should also be reduced to account for overstaffing. Plaintiffs billed for the work of six attorneys from Paul, Weiss, Rifkind, Wharton & Garrison LLP; three attorneys from the Center for Constitutional Rights; and three attorneys from the Legal Aid Society. While the case was complex, it did not require twelve attorneys on Plaintiffs' side. *R.F.M.*, 2020 U.S. Dist. LEXIS 79915, at *19 ("courts in the Second Circuit have reduced fee awards based on overstaffing").

Sixth, Plaintiffs also billed for time spent on tasks they claimed to exclude, such as litigation of the stay in the Supreme Court, *compare* Mot. at 21 (claiming Plaintiffs excluded such time from 1/8/2020 to 1/27/2020) *with* ECF No. 366-1 (Ehrlich entry dated 1/22/2020, Sinnreich entries dated 1/8/2020, 1/16/2020, 1/18/2020, O'Loughlin entries dated 1/8/2020, 1/14/2020), litigation of the second, COVID-based preliminary injunction, *compare* Mot. at 21 (claiming Plaintiffs excluded such time from 4/1/2020 to 6/1/2020) *with* ECF No. 366-1 (Hurwitz entries dated 4/7/2020-4/10/2020), and litigation of Defendants' petition for certiorari, *compare* Mot. at 21 (claiming Plaintiffs excluded such time after 10/7/2020) *with* ECF No. 366-1 (Hurwitz entries dated 10/13/2020, 10/29/2020, 11/16/2020, 11/23/2020, O'Loughlin entries dated 10/22/2020, 10/28/2020). None of that time is compensable.

Seventh, although Plaintiffs did not prevail in this lawsuit, if the Court were to conclude otherwise, any fee award should be significantly discounted because any theoretical "success" was limited and temporary as both of the preliminary injunctions entered in this case were stayed by higher courts. In other cases involving poor results, courts have not hesitated to discount fees by as much as 85%. *See Baylor v. Michell Rubenstein & Assocs., PC*, No. 17-7161, 735 F. App'x 733, 736 (D.C. Cir. June 6, 2018) (affirming district court's "60% discount for [the plaintiff's] limited success" as readily justified); *Roldan v. Pure Air Solutions, Inc.*, 2010 U.S. Dist. LEXIS

12779 at *20 (S.D. Fla. Jan. 29, 2010) (reducing attorneys' fees by 85% based upon limited success of plaintiff). Simply put, securing two stayed preliminary injunctions—before the case was dismissed as moot—does not entitle lawyers to receive over a million dollars of taxpayer money.

Eighth, Plaintiffs also seek reimbursement for various "reimbursable disbursements," including $18,896.58 for "duplication" and $1,208.27 for "court reporting and transcripts." Hurwitz Decl., ECF No. 366 ¶ 16. Plaintiffs, however, have provided no supporting documentation whatsoever to justify or explain those costs. Simply listing categories of expenses and a corresponding dollar figure is insufficient. *See U.S. ex rel for Use & Benefit of Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp.*, 95 F.3d 153, 173 (2d Cir. 1996) (affirming sharp reduction in photocopying costs because the party "did not . . . itemize those costs or explain why all those copies were necessary"); *Citgo Petro. Corp. v. Starstone Ins. Se.*, 2024 U.S. Dist. LEXIS 15323, at *5 (S.D.N.Y. Jan. 29, 2024) (denying requested printing costs where plaintiff did "not explain, itemize, document, or otherwise substantiate the claimed cost").

Lastly, Plaintiffs seek compensation for work performed while this case was on appeal in the Second Circuit. Mot. at 20 & n.9. But "parties should file appeal-related attorney's fee applications in the circuit court, so that it can determine whether district court assistance is required." *Dague v. Burlington*, 976 F.2d 801, 804 (2d Cir. 1991); *see also Schwebel v. Crandall*, 2021 U.S. Dist. LEXIS 104474, at *2 (S.D.N.Y. June 3, 2021). The Court should therefore deny recovery for appellate work.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion.

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Respectfully submitted,

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