UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAKE THE ROAD NEW YORK, et al.	)	
	)	
Plaintiffs	)	
	)	
v.	)	Civil Action No. 19-11633 (GBD)
	)	
MICHAEL POMPEO, Secretary of State, et al.	)	
	)	
Defendants	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR STAY OF INJUNCTION PENDING APPEAL

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PRELIMINARY STATEMENT

The Federal Government defendants respectfully request that the Court grant a stay pending appeal of the part of the Court's July 29, 2020, Memorandum Decision and Order, ECF No. 88, that entered a preliminary injunction against the Department of State's October 2019 rule[1] concerning the public charge ground of inadmissibility.

The Government's request satisfies all the factors justifying a stay: The Government is likely to succeed on appeal because the plaintiffs do not meet the jurisdictional requirement of standing and do not state a valid claim under the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, or any other provision of law. While the Second Circuit's August 4, 2020, decision in *New York v. U.S. Department of Homeland Security*, 969 F.3d 42 (2d Cir. 2020), cuts against some of the defendants' arguments, the Supreme Court earlier granted a stay of the preliminary injunction at issue in that case. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (mem.). That earlier Supreme Court order necessarily reflects a conclusion by the Supreme Court that the Government has a fair prospect of success in *New York*, and indicates that the Second Circuit's August 4, 2020, ruling likely will be overruled. Given these circumstances, the Court should grant a stay of the injunction.

The Government also will suffer irreparable harm in the absence of a stay, because the injunction interferes with the judgments of the Executive Branch regarding the admission and exclusion of foreign nationals seeking to enter the United States, a core Executive Branch responsibility. Moreover, on September 11, 2020, the Second Circuit granted a stay of the July 20, 2020, preliminary injunction that this Court entered against the Department of Homeland

[1] Visas: Ineligibility Based on Public Charge Grounds, 84 Fed. Reg. 54,996 (Oct. 11, 2019) (to be codified at 22 C.F.R. § 40.41).

Security's parallel public charge rule.[2] *New York v. U.S. Dep't of Homeland Sec.*, No. 20-2537, 2020 WL 5495530 (2d Cir. Sept. 11, 2020). Now that the Second Circuit order has restored the DHS rule to operation, the injunction in this case throws the agencies' policies out of alignment. This raises the risk of DHS and Department of State officers making inconsistent determinations under the same statute, for example, individuals being issued visas to travel to the United States but then being denied admission upon their arrival in the United States.

The balance of hardships and the public interest also favor a stay because the individual plaintiffs have no immediate plans to apply for visas and thus have not shown that they would suffer any material harm from the October 2019 rule before final judgment in this action. And the Court granted unlimited nationwide relief even though the plaintiffs did not make an adequate case even for individualized relief.

Accordingly, the Court should grant a stay pending appeal with respect to the Department of State October 2019 public charge rule.

BACKGROUND

The plaintiffs in this case are challenging three Government actions that pertain to the entry of persons into the United States: a January 2018 revision to portions of the Department of State Foreign Affairs Manual, 9 FAM § 302.8-2,[3] pertaining to evaluation of whether a visa applicant is likely to become a "public charge" under the Immigration and Nationality Act (INA),[4] 8 U.S.C. § 1182(a)(4); (2) the President's October 2019 Proclamation concerning Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare

[2] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (codified in scattered sections of 8 C.F.R.).

[3] U.S. Dep't of State, Foreign Affairs Manual.

[4] Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

System, in Order to Protect the Availability of Healthcare Benefits for Americans, Proclamation No. 9945, 84 Fed. Reg. 53,991 (Oct. 4, 2019); and (3) the October 2019 interim final rule published by the Department of State amending its regulation governing the application of the "public charge" provision, 22 C.F.R. § 40.41, 84 Fed. Reg. 54,996.

The plaintiffs moved for a preliminary injunction, and the defendants moved to dismiss. On July 29, 2020, the Court issued a Memorandum Decision and Order, ECF No. 88, resolving both motions. The Court dismissed the President as a defendant and dismissed all claims under the APA that were not directed at any identifiable agency action, but it otherwise denied the motion to dismiss. *See* Mem. Decision and Order 25 nn.5–6, 52. The Court granted the plaintiffs' motion for preliminary injunction, specifying that "Defendants are enjoined from enforcing, applying, implementing, or treating as effective the 2018 FAM Revisions, DOS Rule, and Proclamation." Mem. Decision and Order 52. The Court specified that the injunction "entirely bar[s]" the challenged actions and is not limited to the plaintiffs. Mem. Decision and Order 51.

On the same day, July 29, 2020, the Court entered a preliminary injunction in *New York v. U.S. Department of Homeland Security*, Nos. 19 Civ. 7777 (GBD), 19 Civ. 7993 (GBD), 2020 WL 4347264 (S.D.N.Y. July 29, 2020), barring the defendants from enforcing the August 2019 DHS rule nationwide "for any period during which there is a declared national health emergency in response to the COVID-19 outbreak." *Id.* at *14.

On August 4, 2020, the Second Circuit issued a ruling affirming in part and modifying in part an earlier preliminary injunction order that had been entered in the *New York* case in October 2019. *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42 (2d Cir. 2020), *aff'g and modifying* 408 F. Supp. 3d 334 (S.D.N.Y. 2019), and *Make the Road N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647 (S.D.N.Y. 2019). The Second Circuit noted that its ruling would have no immediate practical

effect because the Supreme Court had earlier stayed the October 2019 injunction pending disposition of any petition for certiorari. *See id.* at 88 (discussing *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (mem.)). The ruling also had no direct effect on the July 2020 injunction against the DHS rule.

On August 12, 2020, the Second Circuit entered an order staying the July 2020 injunction against the DHS rule outside Connecticut, New York, and Vermont. *New York v. U.S. Dep't of Homeland Sec.*, No. 20-2537 (2d Cir. Aug. 12, 2020), ECF No. 35. On September 11, 2020, the Second Circuit granted a stay pending appeal of the July 2020 injunction against the DHS rule. *New York v. U.S. Dep't of Homeland Sec.*, No. 20-2537, 2020 WL 5495530 (2d Cir. Sept. 11, 2020).

ARGUMENT

I. Standards applicable to a motion for stay pending appeal

In considering whether to grant a stay pending appeal, the Court must consider four factors: (1) the applicant's likelihood of success on the merits; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Each of these factors favors entry of a stay in this case.

II. The Government is likely to succeed on the merits.

A. The Supreme Court's earlier January 2020 stay order suggests it is likely the Second Circuit's August 4, 2020, ruling will be overruled.

The Supreme Court's January 2020 stay order[5] supports entry of a stay in this case because it reflects a conclusion by the Supreme Court that the Government met the exacting

[5] *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (mem.).

standards for a stay from the Supreme Court, including a fair prospect that the Government will prevail on certiorari.

The Second Circuit's August 4, 2020, decision in *New York v. U.S. Department of Homeland Security*, 969 F.3d 42 (2d Cir. 2020), held that the plaintiffs in that case adequately alleged standing and were likely to succeed in demonstrating that the August 2019 DHS rule is invalid either because it is incompatible with the INA or is arbitrary and capricious. While those holdings cut against some of the Government's arguments in this case, the Supreme Court's earlier grant of a stay necessarily entails a conclusion by the Supreme Court that the Government has a fair prospect of success on the merits, and indicates that the Supreme Court is likely to overrule the Second Circuit's August 2020 ruling. Moreover, as explained below, the Government is likely to prevail on other issues not addressed by the Second Circuit's August 2020 ruling.

B. The individual plaintiffs cannot meet the jurisdictional requirement of standing.

The individual plaintiffs in this action cannot meet the jurisdictional requirement of standing because they have not alleged that the October 2019 rule has caused them any concrete personal injury.

The individual plaintiffs lack standing because they do not allege any concrete plans to leave the country and apply for visas. In its July 29, 2020, ruling, the Court observed that the plaintiffs had taken preparatory steps to seek lawful permanent resident status through consular processing. *See* Mem. Decision and Order 15. But the plaintiffs have offered no indication of when they or their relatives intend to take the one step that would result in application of the October 2019 rule—leaving the United States and applying for visas. The plaintiffs or their relatives might choose for any number of reasons—for example, health, family, or employment

circumstances, or reasons related to the present global COVID-19 pandemic—to remain in the United States for some time before leaving the United States and seeking a visa. By the time they do complete their applications for visas, their personal circumstances may have changed in ways that would affect the application of the public charge rule, or the rules themselves may have changed. Accordingly, there is no "actual or imminent," "certainly impending" collision between the plaintiffs' interests and the October 2019 rule. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

The Court also found that the individual plaintiffs are "undisputedly subject to the challenged Government actions." Mem. Decision and Order 16. But that is mistaken, because the October 2019 rule applies only when a person applies for a visa to travel to the United States. Again, the plaintiffs have not stated when they or their relatives will apply for visas, and there is no reason to believe they will do so in the immediate future.

C. The plaintiffs cannot challenge the October 2019 rule under the APA.

The plaintiffs cannot challenge the Department of State actions under the APA because the separation of powers bars statutory challenges to policy decisions relating to the admission and exclusion of aliens except in situations where Congress has affirmatively authorized review.

This Court concluded that *Fiallo ex rel. Rodriguez v. Bell*, 430 U.S. 787 (1977), did not suggest a limit on judicial review because that case involved a challenge to the constitutionality of a statute. *See* Mem. Decision and Order 25. But *Fiallo* stated generally that matters concerning the entry of foreign nationals into the United States are "policy questions entrusted exclusively to the political branches of our Government"—Congress as well as the Executive Branch—and "wholly outside the power of [the courts] to control." *Fiallo*, 430 U.S. at 796, 798 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 596–97 (1952) (Frankfurter, J., concurring))). And other cases, such as *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), have recognized the primacy

of Executive Branch judgments on that subject, and the limited role of the judiciary. *See id.* at 2418–19; *see also Hernandez v. Mesa*, 140 S. Ct. 735, 744 (2020) (noting that "courts traditionally have been reluctant to intrude upon the authority of the Executive" in foreign relations matters "unless Congress specifically has provided otherwise.").

The Government did not raise this particular separation of powers argument in its defense of the August 2019 DHS rule, and thus the Second Circuit's decision in *New York v. U.S. Department of Homeland Security*, 969 F.3d 42, does not undermine the Government's argument. These principles prevent the plaintiffs from raising any claims against the October 2019 rule under the APA.

D. The Department of State properly relied on the good cause exception to the notice and comment requirements of the APA.

The Department of State was not required to provide for notice and comment before issuing the October 2019 rule because the Department properly invoked the good cause exception to the notice and comment requirements of the APA. The Court found that the Department failed to establish good cause because it did not point to any imminent threat to public safety. *See* Mem. Decision and Order 35–36. But threats to public safety are not the only circumstances that can support good cause. For example, in *Sepulveda v. Block*, 782 F.2d 363 (2d Cir. 1986), the Second Circuit found that an agency was justified in dispensing with notice and comment merely because it appeared that Congress expected the agency to issue regulations quickly. *See id.* at 366. And in *Malek-Marzban v. INS*, 653 F.2d 113 (4th Cir. 1981), the Fourth Circuit held that foreign policy interests that would be served by expelling Iranian nationals unlawfully present in the United States were sufficient to establish good cause. *See id.* at 116.

Moreover, the Court's ruling gave short shrift to the potential disruption that could arise from inconsistent determinations by the two agencies. For example, if persons were issued visas

under Department of State standards but were then found inadmissible under DHS standards upon their arrival, they would need to be returned to their countries of origin. Some might even be subject to detention before their return. This would result in considerable waste and expense both for the individuals seeking admission and the U.S. Government.

The Court also faulted the agency for not beginning its rulemaking efforts further in advance of the publication of the DHS rule. *See* Mem. Decision and Order 36–37. But DHS is ultimately responsible for deciding whether an alien is admissible, and it was reasonable for the Department of State to await the conclusion of the DHS rulemaking and rely on the judgments DHS reached after considering comments pursuant to the APA.

E. The plaintiffs' equal protection claims also do not support preliminary relief.

Neither the plaintiffs nor the Court relied on the plaintiffs' equal protection claims as a reason to grant preliminary relief. In any event, the plaintiffs are not likely to succeed with an equal protection challenge because they fail to state a valid equal protection claim.

In denying the defendants' motion to dismiss the equal protection claims, the Court incorrectly looked to *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), for the applicable legal standard. *See* Mem. Decision and Order 41 (citing *id.* at 266–68). The proper standard to apply in this case is the more deferential standard prescribed by *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), under which a policy governing the entry of foreign nationals into the United States should be upheld "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 2420. The October 2019 rule is valid under that standard because it bears a clear relation to the lawful interest of limiting fiscal burdens associated with admission of foreign nationals who will later use public benefits.

Moreover, the Court's ruling did not properly account for the Supreme Court's recent ruling in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020). The plurality in *Regents of the University of California* concluded that, even assuming *Village of Arlington Heights* was an appropriate framework for considering the plaintiffs' equal protection claims, the plaintiffs failed to state a claim under that standard. The Court's ruling in this case concluded that the *Regents of the University of California* plurality opinion was distinguishable because this case involves allegations about the "disproportionate *percentage* of nonwhite immigrants that would be hurt by the agency action at issue, as compared to the *percentage* of immigrants from predominantly white countries," while the allegations in *Regents of University of California* pertained to the overall number of Latino immigrants who would be affected by the challenged actions. Mem. Decision and Order 42. But that misapprehended the *Regents of University of California* decision. The plaintiffs in *Regents of University of California*, just like the plaintiffs in this case, complained that the challenged actions would harm members of certain racial groups out of proportion to their representation within the larger population. *See Regents of the Univ. of Cal.*, 140 S. Ct. at 1915 (discussing the "*share* of the unauthorized alien population" compared to the "*share* of recipients of any cross-cutting immigration relief program" (emphasis added)).

The Court also reasoned that *Regents of University of California* was distinguishable because the plaintiffs in this case cited statements by the President made "within months of" the October 2019 rule. Mem. Decision and Order 43. But the statements at issue in *Regents of University of California* were also made "within months of" the challenged action. *See Regents of the Univ. of Cal.*, 140 S. Ct. at 1918 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that the plurality was wrong to discount

statements the President had made "mere months" earlier). The Court also found it relevant that the plaintiffs pointed to alleged statements by a White House senior adviser, *see* Mem. Decision and Order 41–43. But there is no reason to treat statements by other White House officials, "remote in time and made in unrelated contexts," *Regents of the Univ. of Cal.*, 140 S. Ct. at 1916 (plurality opinion), as any more probative than statements by the President when "the relevant actors most directly" are the responsible agency officials, *id.*

III. The Government will be irreparably harmed in the absence of a stay because it is being impaired from properly exercising authority explicitly delegated by Congress.

The Government will suffer irreparable harm if a stay is not granted because, as discussed in the attached Declaration of Brianne Marwaha, the preliminary injunction entered by the Court interferes with the lawful exercise of authority explicitly delegated by Congress to the Executive Branch. That is a substantial harm in itself. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (finding that a State Government suffered irreparable harm when it was prevented from enforcing duly enacted statutes). It is a particularly grievous harm in this case, where the enjoined policy deals with the admission and exclusion of foreign nationals, a "matter within the core of executive responsibility," *Trump v. Hawaii*, 138 S. Ct. 2392, 2402 (2018). Indeed, the Second Circuit's stay order in *New York v. U.S. Department of Homeland Security*, No. 20-2537, 2020 WL 5495530 (2d Cir. Sept. 11, 2020), concluded that DHS demonstrated "irreparable injury from the district court's prohibition on effectuating" its regulation. *Id.* at *3.

Moreover, now that the Second Circuit's stay order in *New York* has restored the Department of Homeland Security's parallel public charge rule to operation, the injunction in this case throws the agencies' policies out of alignment. This raises the risk of DHS and Department of State officers making inconsistent determinations under the same statute, for

example, individuals being issued visas to travel to the United States but then being denied admission upon their arrival in the United States. As discussed above, such instances would entail significant disruption and expense both for the individuals involved and for the Government.

IV. The plaintiffs will not be harmed by a stay, and a stay is in the public interest.

The plaintiffs will not be harmed by a stay. As the Court noted in its ruling, preliminary relief is proper only when it is needed to prevent harm that "cannot be remedied if a court waits until the end of trial to resolve the harm." Mem. Decision and Order 45–46 (quoting *Grand River Enter. Six Nations v. Pryor*, 481 F.3d 62, 66 (2d Cir. 2007) (per curiam)). The plaintiffs have not met this requirement. The plaintiffs and their family members are all in the United States, and none of them has indicated that they plan to leave the United States and apply for a visa at any time before this Court has entered a final ruling. Consequently, they have not shown that they face any risk of "family separation," Mem. Decision and Order 46, or any other harm in connection with the denial of a visa, while the litigation is pending. Even if the plaintiffs' legal claims were valid, any harm to the plaintiffs could be fully addressed on final judgment.

The organizational plaintiffs likewise have not demonstrated irreparable harm. The Court found that the organizational plaintiffs faced irreparable harm in the form of "diversion of their resources and irretrievable frustration of their missions." Mem. Decision and Order 47. But the need to make adjustments to existing services is not the kind of serious harm needed to justify preliminary relief. Moreover, the organizational plaintiffs have not demonstrated that entry of a preliminary injunction will relieve any drain on their resources while the litigation proceeds. *See A.X.M.S. Corp. v. Friedman*, 948 F. Supp. 2d 319, 336 (S.D.N.Y. 2013) ("[T]he Court should not grant the injunction if it would not . . . prevent [the asserted] injury."). The evidence submitted by the plaintiffs in fact showed that a preliminary injunction would *not* forestall injury. For

example, the Executive Director of plaintiff CARECEN–NY stated in a sworn declaration that even though the Proclamation and the DHS rule had been preliminarily enjoined by rulings in other cases, plaintiff CARECEN–NY still "has had to continue the additional work of educating our clients about the potential effects of the Proclamation should any preliminary injunction be limited or overturned." Decl. of Andrew J. Ehrlich in Supp. of Pls.' Mot. for a Prelim. Inj. (Ehrlich Decl.) Ex. 20 ¶¶ 13–14 (Decl. of Elise de Castillo), ECF No. 45. And plaintiff Catholic Charities Community Services indicated that it planned to organize phone and online education efforts "in anticipation of the Consular Rules or DHS rules being implemented," even though the DHS rule was preliminarily enjoined at the time. *See* Ehrlich Decl. Ex. 21 ¶ 35 (Decl. of C. Mario Russell), ECF No. 45.

V. It was improper for the Court to grant nationwide relief.

It also was improper for the Court to issue nationwide relief extending beyond the plaintiffs in this action. As Justice Gorsuch observed in connection with the Supreme Court's order staying the preliminary injunction against the DHS rule, nationwide injunctions raise serious separation of powers concerns, hamper orderly judicial resolution of issues within and across cases, and improperly disadvantage the Government. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600–01 (2020) (Gorsuch, J., concurring in grant of stay). Nationwide injunctions also run counter to the traditional principle that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

In *New York v. U.S. Department of Homeland Security*, 969 F.3d 42, the Second Circuit noted that a "district judge issuing a nationwide injunction may in effect override contrary decisions from co-equal and appellate courts, imposing its view of the law within the geographic jurisdiction of courts that have reached contrary conclusions." *Id.* at 88. Nationwide injunctions

are particularly problematic "where contrary views could be or have been taken by courts of parallel or superior authority, entitled to determine the law within their own geographical jurisdictions." *Id.* These considerations, the court concluded, outweighed interests in uniform application of immigration law. *See id.*

These principles make clear that nationwide preliminary relief is improper in this case. The nationwide preliminary injunction entered by the Court preempts consideration of the issues by other courts in other Circuits. The Department of State's October 2019 rule is also being challenged in another case pending in the District of Maryland, *Mayor & City Council of Baltimore v. Trump*, No. 18-cv-3636 (D. Md. filed Nov. 28, 2018). That court is "entitled to determine the law within [its] own geographical jurisdiction[]," *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 88. Indeed, the Fourth Circuit has already disagreed with the Second Circuit about the August 2019 DHS rule, concluding that the rule is "unquestionably lawful." *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 251 (4th Cir. 2020).

The Court's July 29, 2020, ruling also raised a concern that an injunction limited in scope would be "unworkable" for the Department of State, Mem. Decision and Order 51, but that concern does not justify nationwide relief. Unless a class action has been authorized, injunctive relief ordered by a court should be limited to the named plaintiffs. If the defendant concludes that the most practical way to achieve compliance is to implement nationwide measures, the defendant can then proceed in that manner. But that determination should be left to the defendant—a court should not take the issue out of the defendant's hands by specifying that the relief should apply nationwide. *See CASA de Md.*, 971 F.3d at 262 ("[T]he district court improperly stepped into the shoes of DHS and displaced our democratic process of governance when it insisted that a nationwide injunction was necessary for pragmatic reasons.").

CONCLUSION

Because the Government satisfies each of the factors justifying a stay, the Court should stay the preliminary injunction against the October 2019 rule pending appeal.

Date: September 22, 2020

Respectfully submitted,

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