No. 20-3214

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

v.

MICHAEL POMPEO, in his official capacity as Secretary of State, UNITED STATES DEPARTMENT OF STATE, and ALEX AZAR, in his official capacity as Secretary of Health and Human Services,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

APPELLANTS' MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

The federal government respectfully requests a stay pending its appeal of the district court's preliminary injunction barring implementation of the Department of State's interim final rule (State Rule or Rule) interpreting the statutory provision that renders inadmissible any alien who a consular officer determines is "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). *See Visas: Ineligibility Based on Public Charge Grounds*, 84 Fed. Reg. 54,996 (Oct. 11, 2019). The State Department issued its Rule to align its standards for determining whether a visa applicant is inadmissible as likely to become a public charge with the standards adopted by the Department of Homeland Security (DHS), which applies the public-charge inadmissibility provision to all aliens subject to the provision, including visa holders, who seek to enter the country. The State Rule, in keeping with DHS's rule, defines the term "public charge" to mean those aliens who receive certain public benefits, including specified noncash benefits, for more than twelve months in the aggregate within any thirty-six-month period. The Rule also describes how consular officers will determine whether an alien is likely to become a public charge.

The government is likely to prevail on its appeal. As a threshold matter, plaintiffs' claim are not reviewable. The Supreme Court and Congress have long recognized that decisions by executive branch officers to exclude aliens from the country, such as a consular officer's decision to deny a visa, are not judicially reviewable. Plaintiffs in this case argue that application of the State Rule by consular

officers will result in the unlawful denial of their, their family members', or their clients' visa applications. Just as plaintiffs' claims would be unreviewable if they were challenging the actual denial of a visa on such grounds, those claims are unreviewable when brought in anticipation of having a visa denied.

Even if plaintiffs' claims were reviewable, the government is likely to prevail on appeal given the parallel DHS rule. Because the DHS rule applies to *all* aliens seeking entry at the border who are subject to the public-charge provision (including those to whom the State Department has granted visas), plaintiffs, their family members, and their clients remain subject to the challenged public-charge standard. Plaintiffs thus cannot show that the State Rule will cause them irreparable harm absent a preliminary injunction or that the State Department acted unreasonably in aligning its Rule with DHS's rule. And because the State Department needed to align its Rule with the DHS rule on short notice to avoid the confusion and adverse consequences that inconsistent standards would produce, it was not required to engage in notice-and-comment rulemaking before promulgating the interim rule.

The remaining factors likewise weigh in favor of a stay. So long as the State Rule is enjoined, the Department cannot align its public-charge standards with the standards applied by DHS officers at the border. The existence of different standards threatens to sow confusion among aliens and the public—the very harm that forms the basis of plaintiffs' irreparable injury—with little or no corresponding benefit,

given that all relevant aliens remain subject to the DHS rule at the border. The balance of the equities and the public interest thus plainly favor a stay.

STATEMENT

1. Under the Immigration and Nationality Act, a person seeking to enter the United States who is not a U.S. citizen or lawful permanent resident generally must obtain a visa. There are two main types of visas: immigrant visas, for persons seeking to reside in the United States permanently, and nonimmigrant visas, for temporary stays in the United States. *See* 8 U.S.C. § 1181(a); *id.* § 1182(a)(7). A person seeking a visa of either type must complete an application and in most cases must schedule an in-person interview with a consular officer at a U.S. embassy or consulate. *See* 8 U.S.C. § 1202(a), (e); 22 C.F.R. § 42.62.

An individual is ineligible for a visa if the individual is inadmissible to the United States. 8 U.S.C. § 1182. One ground of inadmissibility, the public-charge ground, provides that

> [a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

8 U.S.C. § 1182(a)(4).[1] In evaluating whether an alien is likely to become a public charge, a consular officer and DHS "shall at a minimum consider the alien's (I) age;

[1] The statute refers to the Attorney General, but in 2002 Congress transferred the Attorney General's authority to the Secretary of Homeland Security. *See* 8 U.S.C. § 1103; 6 U.S.C. § 557.

(II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." *Id.* § 1182(a)(4)(B).

Although a visa normally is necessary for admission to the United States, it does not guarantee admission; a visa holder still must be found admissible upon inspection at a port of entry by a Customs and Border Protection officer. *See id.* §§ 1201(h), 1185(d), 1225(a), 1182(a)(4). Thus, DHS in *all* cases ultimately determines whether an alien who presents at the border is inadmissible on the public-charge ground.

2. Congress has never defined the term "public charge," instead leaving the term's definition and application to the Executive's discretion. In 1999, the Immigration and Naturalization Service issued guidance defining "public charge" to mean an alien "who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) the receipt of public cash assistance for income maintenance purposes, or (ii) institutionalization for long-term care at Government expense." 64 Fed. Reg. 28,676, 28,681 (May 26, 1999). The State Department subsequently issued guidance to its consular officers adopting the INS's definition. *See* 9 Foreign Affairs Manual 302.8-2(B)(1) (2017).

In August 2019, DHS promulgated a rule setting forth a new framework for the public-charge inquiry. The DHS rule defines "public charge" to mean "an alien who receives one or more [specified] public benefits … for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two

benefits in one month counts as two months)." 84 Fed. Reg. at 41,501. The specified public benefits include cash assistance for income maintenance and certain noncash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. *Id.*

The DHS rule also sets forth a framework for evaluating whether, considering the "totality of an alien's individual circumstances," the alien is "[l]ikely at any time to become a public charge." 84 Fed. Reg. at 41,501-04. Among other things, the framework identifies factors the adjudicator must consider in making public-charge inadmissibility determinations. *Id.* The DHS rule's effective date was October 15, 2019.

In October 2019, the State Department published an interim final rule amending its regulations governing the application of the public-charge provision. 84 Fed. Reg. at 54,996. The interim rule mirrors the definition and framework adopted by DHS in its August 2019 rule. In adopting the Rule, the State Department emphasized the importance of keeping its public-charge standards in alignment with the standards adopted by DHS, so as to prevent situations in which individuals issued visas to travel to the United States by consular officers were deemed inadmissible at the border by DHS officers applying a different standard. *See* 84 Fed. Reg. at 55,000.

3. Numerous plaintiffs filed suits challenging the DHS rule. District courts in New York, California, Washington, Illinois, and Maryland issued preliminary injunctions barring enforcement of the DHS rule, all of which have been stayed. *See*

New York v. USDHS, 969 F.3d 42, 58 n.15 (2d Cir. 2020). The Ninth and Fourth Circuits granted the government's request for stays, while this Court and the Seventh Circuit denied the government's requests. *See id.* at 58. The Supreme Court then granted the government's request for a stay pending disposition of any petition for writ of certiorari in the Second and Seventh Circuit cases. *See id.* The DHS rule thus went into effect nationwide on February 24, 2020. *New York*, 969 F.3d at 58. The district court overseeing this litigation entered a second nationwide injunction barring enforcement of the DHS rule on July 29, 2020, which this Court has since stayed. *See New York v. USDHS*, 2020 WL 347264 (S.D.N.Y.), *stayed*, 2020 WL 5495530 (2d Cir. 2020).

On August 4, 2020, this Court issued a decision affirming the district court's preliminary injunction of the DHS rule. *New York*, 969 F.3d at 50. As relevant here, this Court concluded that the organizational plaintiffs had constitutional and statutory standing to challenge the DHS rule. *See id.* at 60-63. This Court also concluded that plaintiffs were likely to prevail in establishing that the DHS rule was contrary to the INA and arbitrary and capricious. *See id.* at 74-86.

On October 7, 2020, the government filed petitions for writs of certiorari seeking review of the decisions of this Court and of the Seventh Circuit, which had affirmed the Illinois preliminary injunction. *DHS v. New York*, No. 20-449 (S. Ct.); *Wolf v. Cook County*, No. 20-450 (S. Ct.). In light of the Supreme Court's stays, the DHS rule remains in effect.

4. Plaintiffs in this litigation—five nonprofit organizations that provide educational and legal services to immigrant communities and five individuals or family members of individuals who are unlawfully present in the United States and will have to apply for a visa at a consular office abroad and then be admitted to the country—challenged the State Department's rule, alleging that it is not a permissible construction of "public charge," is arbitrary and capricious, was improperly promulgated without notice and comment, runs afoul of the equal protection component of the Fifth Amendment, and violates the Rehabilitation Act. Dkt. 1, at 105-109.[2]

On July 29, 2020, the district court granted plaintiffs' request for a universal preliminary injunction barring the State Department from implementing the Rule. Attachment A (Op.). The court concluded that the individual plaintiffs had standing because they had a reasonable fear that they would be deemed inadmissible under the State Rule. Op. 14-15. The court further concluded that plaintiffs faced actual and imminent injury, notwithstanding their failure to specify when they intended to leave the country to apply for a visa, because "they or their family members are actively engaged in the process of" completing the preliminary steps before seeking a visa. Op. 15. The court concluded that the organizational plaintiffs had standing because

[2] Plaintiffs also challenged (and the district court enjoined) certain January 2018 revisions to the State Department's Foreign Affairs Manual and Presidential Proclamation No. 9945, which suspended entry for certain aliens who lack health insurance. Those challenges are not relevant to this motion.

the State Rule has required them to expend "significant time and resources to" counter the Rule's impact. Op. 17-18. The court also determined that the organizational plaintiffs were within the public-charge provision's zone of interests. Op. 22.

The court rejected the government's argument that plaintiffs' statutory claims were unreviewable because they concerned decisions by consular officers regarding the admission or exclusion of aliens. Op. 25. The court reasoned that the consular nonreviewability doctrine applied only to congressional legislation and did not limit "judicial review [of] *executive or agency action*." *Id.*

On the merits, the court concluded that plaintiffs were likely to prevail on their claim that the State Rule's definition of "public charge" was not consistent with the INA, for the same reasons it had previously concluded that the DHS rule violated the INA. Op. 31-32. The court likewise determined that the Rule was arbitrary and capricious in the same respects as the DHS rule. Op. 32-33.

The court further concluded that plaintiffs were likely to succeed in demonstrating that the State Rule violated the APA because the State Department did not provide for notice and comment before issuing the rule. Op. 35-36. The court rejected the government's claim that it had "good cause" to forgo notice and comment given the impending effective date of the parallel DHS rule and the need to align the State Department's public-charge standard with DHS's standard. *Id.*

5. On September 22, 2020, shortly after this Court stayed the district court's second preliminary injunction against the DHS rule—thus creating a disparity between the DHS rule and the State Rule—the government sought a stay from the district court. On October 7, 2020, the government asked the court to rule on its stay motion by October 16, and informed the court that it would seek relief from this Court after that date. On October 13, the district court entered an order denying the government's request for a ruling by October 16.

ARGUMENT

I. The Government Is Likely To Prevail On The Merits

A. Plaintiffs' APA Claims Are Not Reviewable

Plaintiffs' statutory challenges to the State Rule are not reviewable. The Supreme Court "ha[s] long recognized the power to … exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power," "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952). The Supreme Court has accordingly held that "[t]he conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to

terminate hospitality to aliens, [and] the grounds on which such determination shall be based" are "wholly outside the power of this Court to control." *Fiallo*, 430 U.S. at 796.

Congress generally "may, if it sees fit, … authorize the courts to" review decisions to exclude aliens. *Nishimura Ekiu v. United, States*, 142 U.S. 651, 660 (1892). Absent such affirmative authorization, however, judicial review of the exclusion of aliens outside the United States is unavailable. "Whatever the rule may be concerning deportation of persons who have gained entry into the United States," the Supreme Court has explained, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see id.* at 542-547 (Attorney General's decision to exclude alien wife of U.S. citizen "for security reasons" was "final and conclusive"); *see also Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (denial of visa to an alien abroad "is not subject to judicial review … unless Congress says otherwise"); *American Academy of Religion v. Napolitano*, 573 F.3d 115, 123 (2d Cir. 2009) (same).

This longstanding principle of nonreviewability is embodied in the INA. In 8 U.S.C. § 1252, Congress established a comprehensive framework for judicial review of decisions concerning aliens' ability to enter or remain in the United States, including aliens who lack a visa or are found inadmissible. But that review is available only to aliens who are physically present in the United States. Neither Section 1252

nor any other provision of the INA provides for judicial review of the denial of a visa or entry to an alien abroad, or of a determination that such an alien is inadmissible. Indeed, Congress has expressly rejected a cause of action to seek judicial review of visa denials. *E.g.*, 6 U.S.C. 236(f) (no "private right of action" to challenge decision "to grant or deny a visa").

Plaintiffs anticipate that their, their family members', or their clients' visa applications will be denied by consular officers applying the Rule. Such claims are not subject to judicial review. *See American Academy of Religion*, 573 F.3d at 123. As the D.C. Circuit has explained, allowing "APA review would give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the United States as a defendant." *Saavedra Bruno*, 197 F.3d at 1161. And just as plaintiffs' APA claims would be unreviewable if they had been brought following such a denial, they are unreviewable when brought in anticipation of a visa denial by a consular officer.

The district court erred in concluding that these principles apply only to judicial review of immigration legislation, and do not limit judicial review of "executive or agency action." Op. 25. The quintessential application of the nonreviewability doctrine is to bar review of an executive action: a consular officer's denial of a visa. *See, e.g.*, *Am. Academy of Religion*, 573 F.3d at 123.

In the district court, plaintiffs asserted that an Executive Branch official's visa-related actions are reviewable for compliance with the INA because, according to

plaintiffs, an official who violates the INA is operating contrary to the will of Congress. That assertion finds no support in the law. The courts of appeals have declined to review challenges to the exclusion of aliens abroad, even when plaintiffs asserted errors of law. *Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987) (per curiam) (denial of visa "not reviewable" even though alien claimed it "was not authorized by the [INA]"); *De Castro v. Fairman*, 164 Fed. Appx. 930, 932 (11th Cir. 2006) (per curiam) (refusing to consider challenge to denial of visa to plaintiff's wife despite allegation that it "constituted legal error" and "a violation of his rights under the INA"). And plaintiffs' argument is contrary to the reasoning of the Supreme Court's cases in this area, which have focused on the separation of powers between the "political departments" and the judiciary. *Fiallo*, 430 U.S. at 792.

B. Plaintiffs Lack Standing

The district court also erred in concluding that the individual and organizational plaintiffs have standing to pursue their APA claims. The government acknowledges that this Court previously concluded that several of the organizational plaintiffs in this case have suffered injuries that permit them to challenge DHS's public-charge rule. *See New York*, 969 F.3d at 60-63. The government preserves the arguments raised in the government's briefing in *New York* and in the district court here, regarding the insufficiency of the organizational plaintiffs' alleged injuries to support their standing.

The individual plaintiffs' injuries are also insufficient to support their standing to challenge the Rule. The individual plaintiffs allege that they or a relative are currently unlawfully present in the United States, have either obtained or are seeking approval for a waiver of inadmissibility for unlawful presence, and intend to leave the United States and apply for a visa abroad. Dkt. 1 ¶¶ 44, 46–49. But plaintiffs' complaint does not specify when any of the prospective visa applicants plans to leave the United States, nor does it even generally specify that it will be in the near future. "'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of … 'actual or imminent' injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Even assuming the prospective visa applicants will someday follow through on their plans to apply for visas overseas, their individual circumstances may be different by that time, including in ways that affect the application of the State Rule.

Even assuming the organizational and individual plaintiffs have alleged cognizable injuries for standing purposes, they nonetheless lack standing to challenge the State Rule because their alleged injuries would not be "redressed by a favorable decision" in this case. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Even if the State Rule is enjoined, plaintiffs, their family members and their clients remain subject to the DHS rule, which applies to all relevant aliens (including visa holders) and uses the same standard as the State Rule. Thus, the organizational plaintiffs' need to reallocate resources to educate members about the new public-charge standard would

not be affected, and the individual plaintiffs' fears that they will be found inadmissible would not be alleviated.

C. The Rule Adopts A Permissible Construction Of The INA And Is Not Arbitrary and Capricious

In *New York*, this Court concluded that the plaintiffs were likely to prevail in demonstrating that the parallel DHS rule was contrary to the INA and arbitrary and capricious. 969 F.3d at 74-86. Because the State Rule adopts the same definition of "public charge" as the DHS rule and, in all relevant respects, the same framework for determining whether an alien is likely to become a public charge, the government acknowledges that this Court's conclusions apply here with regard to the INA and DHS's rationale for implementing the new standards. The government respectfully disagrees with the Court's determinations and preserves the arguments the government made below and in *New York* in support of the conclusion that the parallel agency rules are consistent with the INA and not arbitrary and capricious. To the extent the district court concluded that the State Rule was arbitrary and capricious for reasons independent of the DHS rule, that was error. The State Department's primary justification for its Rule—to align its standard with DHS's standard—was plainly rational.

Moreover, in granting a stay of an injunction barring the DHS rule from going into effect, the Supreme Court necessarily concluded that the government has a fair prospect of success on the merits of its defense of the DHS rule. That same

conclusion should therefore apply to the State Rule, which tracks the DHS rule in all relevant respects. The Supreme Court's decision allowing the DHS rule to go into effect undermines the district court's conclusion that plaintiffs are likely to prevail in this litigation. At a minimum, the Supreme Court's stay decision supports a stay of the district court's injunction pending the government's appeal. *See Casa de Maryland, Inc. v. Trump*, 971 F.3d 220, 230 ("[E]very maxim of prudence suggests that we should decline to take the aggressive step of ruling that the plaintiffs here are in fact likely to succeed on the merits right upon the heels of the Supreme Court's stay order necessarily concluding that they were unlikely to do so.").

D. The State Department Had Good Cause To Forgo Notice And Comment

Plaintiffs are also unlikely to prevail on their claim that the State Department violated the APA when it promulgated the Rule without a notice-and-comment period. When an agency issues a legislative rule, notice and comment are not required "when the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B); *see also id.* § 553(d)(3). The State Department invoked this exception, explaining that it was necessary to put its rule in place immediately given the impending effective date of the August 2019 rule issued by DHS, which was set to take effect October 15, 2019. 84 Fed. Reg. at 55,011. The State Department stressed that it was "critical" to promptly align the standards applied by consular officers with

the standards applied by CBP officers at the U.S. border, to prevent situations in which consular officers "might issue visas to applicants who would later arrive at a port of entry and be found inadmissible by [CBP] under the new DHS public charge standards, based on the same information that was presented to the adjudicating consular officer." *Id.*

The need to avoid the application of inconsistent standards justifies the issuance of an interim rule without the typical notice-and-comment period. *See Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981). In *Block*, for example, the Department of Agriculture posted interim regulations, without notice and comment, after a district court enjoined the agency's previous guidance. *Id.* at 1155. The court of appeals concluded that the agency had good cause to forgo notice and comment with respect to the interim regulations, because the district court's injunction would otherwise have forced the agency to rely on "antiquated guidelines," thereby "creating confusion among field administrators" and causing "economic harm and disruption" to regulated parties and consumers. Similarly, in this case, had the State Department not issued a conforming rule before the DHS rule went into effect, State Department consular officers and DHS officials would have been applying different standards, causing confusion for visa applicants and the organizations that support them and potentially resulting in a visa holder's expending the time and resources to acquire a visa and travel to the United States only to be deemed inadmissible at the border by a CBP agent. Plaintiffs have identified no reason why it

would be sensible for the State Department to apply a narrower standard than DHS, which has ultimate responsibility for determining whether aliens subject to the public charge provision are inadmissible on that ground.

The district court erroneously concluded that the State Department lacked good cause to issue the Rule without notice and comment because its need to issue a conforming rule on short notice was allegedly "self-inflicted" and "artificial." Op. 36. That is not the case. DHS issued its final rule in August 2019, only two months before it was set to take effect. 84 Fed. Reg. at 41,292. Moreover, the DHS rule, including its definition of "public charge," differed in various respects from the proposed rule DHS had issued several months earlier. *See id.* at 41,297-300. Thus, contrary to the district court's supposition, the State Department could not have sought notice and comment on a conforming regulation until after DHS issued its final rule.

A notice-and-comment period also would not have served any practical purpose. Given that DHS is ultimately responsible for applying the public-charge inadmissibility provision to aliens seeking admission, the State Department reasonably concluded it was best to align its Rule with the DHS rule and avoid differing standards and inconsistent applications of the same statute. And, as noted, plaintiffs have identified no reason why the State Department would have adopted a narrower standard than DHS had a notice-and-comment period preceded the Rule's issuance.

E. Plaintiffs Cannot Establish That They Will Be Irreparably Harmed Absent An Injunction

The government is also likely to succeed in having the district court's injunction set aside because plaintiffs cannot demonstrate that they will be irreparably harmed absent a preliminary injunction. As discussed above, DHS's parallel public-charge rule has taken effect and injunctions against it have been stayed while the Supreme Court considers the government's petitions for writs of certiorari in *New York* and *Cook County*. Moreover, in granting stays of the injunctions issued by the district courts in *New York* and *Cook County*, the Supreme Court necessarily concluded that there is a "fair prospect" it will grant the petitions and reverse the injunctions. *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). Thus, the DHS rule will remain in effect for the foreseeable future.

While the DHS rule is in place, plaintiffs cannot establish that they will be irreparably harmed absent an injunction of the State Rule during the pendency of this litigation. Even if the State Rule is enjoined, visa applicants remain subject to the DHS rule at the border. Thus, the individual plaintiffs' fears that they or their family members may be deemed inadmissible on the public-charge ground and thus will be unable to return to the United States after seeking a visa abroad will not be alleviated by an injunction against the State Rule. Similarly, in light of the DHS rule, the organizational plaintiffs must educate their clients about the new public-charge inadmissibility standards and divert their resources to counter those standards, even if

the State Rule is enjoined. Indeed, an injunction preventing the State Rule from going into effect would subject aliens to two different standards, sowing confusion among aliens and their family members and only increasing the harm to them and the organizations that advise them. In short, plaintiffs cannot establish that the State Rule causes them irreparable harm that an injunction during the pendency of this litigation would alleviate.[3]

II. The Remaining Factors Favor A Stay

Both the government and the public will be harmed if the State Rule cannot go into effect. Interference with the exercise of authority granted to the State Department under the INA is a substantial harm in itself. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). In addition, in the absence of a stay, consular officers will be required to apply a standard when evaluating whether a visa applicant is likely at any time to become a public charge that is inconsistent with the standard CBP officers will apply to that same individual. This circumstance raises the risk that DHS and State Department officers will make inconsistent determinations under the same statute. That could create significant practical difficulties, such as individuals being issued visas to travel to the United States but then being denied admission upon their arrival in the United States. Such situations

[3] As noted *supra* p. 14, the individual plaintiffs have not established that they will be subject even to the State Rule in the near future. For that independent reason, they cannot establish that the State Rule will cause them irreparable harm during the pendency of this litigation.

would entail significant harm both for the aliens involved and for the government. The existence of inconsistent rules also threatens to create confusion among aliens and the organizations that serve them.

On the other hand, as explained above, a preliminary injunction barring enforcement of the State Rule will not free plaintiffs of the public-charge inadmissibility rule, given the existence of the parallel DHS rule. Because the government and the public would be harmed by an injunction against the State Rule, while plaintiffs would receive little practical benefit from one, the balance of equities and public interest weigh in favor of stay.

III. The Court Should At Least Stay The Injunction In Part

At a minimum, the Court should stay the injunction insofar as it sweeps more broadly than necessary to redress plaintiffs' alleged injuries. The district court justified its injunction's universal scope based on the need for uniformity in immigration enforcement. Op. 50. But that asserted need cannot overcome the fundamental principle that an injunction "must be narrowly tailored to remedy the specific harm shown." *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028-29 (9th Cir. 2019). An injunction barring enforcement of the Rule against the individual plaintiffs or against individuals who are served by the organizational plaintiffs (i.e., those within the Second Circuit) would fully remedy plaintiffs' alleged harms. And given that the State Rule has been challenged in other jurisdictions, *see Mayor & City Council of Balt. v. Trump*, No. 18-cv-3636 (D. Md.), the court's injunction raises the "unseemly"

possibility that it may be "imposing its view of the law within the geographic jurisdiction of courts that [will] reach[] contrary conclusions." *New York*, 969 F.3d at 88. For these reasons, this Court limited the nationwide injunction the district court entered against the DHS rule, *see id.*, and should do so here.

CONCLUSION

The preliminary injunction should be stayed pending the government's appeal.

Respectfully submitted,

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October 2020