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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFFS-APPELLEES' RESPONSE TO MOTION FOR A STAY PENDING APPEAL

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PRELIMINARY STATEMENT

The Department of State's "public charge" rule (the "Interim Final Rule" or "IFR") dramatically and unlawfully expands the government's ability to deny immigrant visas to the poor. The rule is contrary to more than a century of judicial and administrative interpretation of the statutory term "public charge." On voluminous briefing, the district court concluded that the IFR and related policies and actions by federal agencies and officials are likely contrary to law and will cause irreparable harm, and that the balance of hardships and the public interest support a preliminary injunction.

Belatedly, giving the district court little chance to issue a decision first, defendants now ask the Court, without full briefing and argument, to reject those findings and legal conclusions pending appeal. The Court should deny defendants' motion because all relevant factors weigh strongly against a stay.

First, defendants cannot make a strong showing that they are likely to succeed on this appeal. Several of defendants' arguments are directly foreclosed by this Court's recent decision in a related case, *New York* v. *DHS*, 969 F.3d 42 (2d Cir. 2020), in which this Court affirmed an injunction barring enforcement of the Department of Homeland Security's public charge rule (the "DHS Rule"). The DHS Rule distorts the longstanding interpretation of "public charge" in the same manner as the IFR. Specifically, this Court's holdings that the plaintiffs had

standing to challenge the DHS Rule; that the DHS Rule is likely contrary to the plain meaning of the Immigration and Nationality Act (the "INA"); and that the Department of Homeland Security's ("DHS") rulemaking was arbitrary and capricious apply equally here.

Defendants' remaining arguments lack merit. The IFR is obviously judicially reviewable under the Administrative Procedure Act (the "APA"), and no case or statute says otherwise. Defendants' arguments against reviewability would constitute an unprecedented evisceration of the judiciary's powers of review. Further, the Department of State's ("DOS") rulemaking process for the IFR was procedurally defective. The agency's decision to bypass notice-and-comment procedures is indefensible under the APA's "good cause" exception. DOS had ample opportunity to issue the IFR pursuant to notice-and-comment procedures and chose not to. As defendants admit, DOS blindly followed DHS and conformed its rule to DHS's, rather than engaging in its own deliberative process. That was a clearly defective rulemaking that deprived the public of the opportunity to participate meaningfully.

Second, there is no irreparable harm to defendants from the district court's injunction. Defendants' two-month delay in seeking a stay belies their assertions otherwise. There is no harm to defendants from a lack of "alignment" between the DHS Rule and the IFR. That "lack of alignment" is nothing new, and the specter

of "inconsistent" public charge determinations that defendants invoke lacks any factual basis. The injunction simply returns DOS to the longstanding regime for public charge deliberations, which irreparably harms no one.

Third, defendants do not address the district court's findings that implementing the IFR will cause enormous harm to plaintiffs and the public. Those unchallenged findings further counsel against a stay pending appeal.

Defendants' belated motion should be denied.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This is the second of two related cases in the Southern District of New York in which private parties have challenged agency regulations that dramatically expand the government's bases for excluding intending immigrants from lawful permanent residence in the United States. The first case is *Make the Road N.Y.* v. *Cuccinelli*, No. 19-cv-7993 (S.D.N.Y.) (the "DHS Case"), in which the plaintiffs have challenged the legality of the DHS Rule, *see* 84 Fed. Reg. 41,292. In the second case—the case now before this Court—the plaintiffs have challenged the legality of the IFR, *see* 84 Fed. Reg. 54,996, and other actions taken by federal government agencies and officials.

Both the DHS Rule and the IFR purport to implement Section 212(a)(4) of the INA, 8 U.S.C. § 1182(a)(4). Under the statute, noncitizens seeking admission into the United States, noncitizens seeking visas abroad at a U.S. consulate or

embassy, and those residing in the United States seeking to adjust their immigration status to that of lawful permanent resident or to change or extend their nonimmigrant visa status may be denied admission, a visa, status adjustment, or a visa extension or change if, in the government's opinion, they are "likely at any time to become a public charge." *Id*. The DHS Rule applies to determinations by DHS officials regarding noncitizen admission into the United States and status adjustment for those residing in the United States. *See* 84 Fed. Reg. at 41,501-08. The DOS Rule applies to determinations by U.S. consular officers about whether to issue visas to noncitizens at U.S. consulates and embassies abroad. *See* 84 Fed. Reg. at 55,012-15. The two rules are virtually identical in substance.

The DHS Rule. DHS issued its proposed rule for notice-and-comment on October 10, 2018. 83 Fed. Reg. 51,114. DHS issued the final DHS Rule on August 14, 2019, with an intended effective date of October 15, 2019. 84 Fed. Reg. 41,292.

Prior to the issuance of the DHS Rule, when determining whether individuals seeking admission or adjustment of status were likely to become a public charge, DHS primarily relied upon Field Guidance issued in 1999 by the Immigration and Naturalization Service, the relevant predecessor agency. *See* 64 Fed. Reg. 28,689 (the "1999 Field Guidance"). Under the 1999 Field Guidance, "public charge" is defined as a noncitizen who is (or 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 or (ii) institutionalization for long-term care at government expense." *Id.* at 28,689. The DHS Rule redefines "public charge" to include receipt or predicted receipt of any amount of specified noncash supplemental public benefits for an aggregate of 12 months over any 36-month period. *See* Proposed 8 C.F.R. § 212.21(a).

The DOS Interim Final Rule. DOS issued its public charge regulation as an interim final rule on October 11, 2019, to take effect only four days after, on October 15, 2019. 84 Fed. Reg. 54,996. No notice-and-comment period preceded the IFR's issuance. Rather, DOS issued the IFR pursuant to the APA's "good cause" exception for avoiding notice-and-comment. *See id.* at 55,011.

Prior to the issuance of the IFR, the prevailing guidance consular officers followed when determining whether individuals seeking visas were likely to become public charges was contained in the DOS *Foreign Affairs Manual and Handbook* (the "FAM"). *See* U.S. Dep't of State, http://fam.state.gov/. Until 2018, the FAM prohibited consular officers from considering past, current, or future use of noncash benefits. Ex. 1, [Pre-2018] 9 FAM § 302.8-2(B)(3). (Citations to "Ex. __" are to exhibits to the attached Declaration of Andrew J. Ehrlich.)

In January 2018, DOS revised the FAM. The revisions (the "FAM Revisions") direct consular officers making public charge determinations to look for any "[p]ast or current receipt of public assistance of any type by the visa applicant or a family member in the visa applicant's household," including noncash benefit programs. Ex. 2, [Post-2018] 9 FAM § 302.8-2(B)(2).

In October 2019, DOS issued the IFR. DOS stated that the IFR is "intended to align the Department's standards with those of the Department of Homeland Security." 84 Fed. Reg. 54,996. Like the DHS Rule, the IFR redefines "public charge" to include receipt or predicted receipt of any amount of specified noncash public benefits for an aggregate of 12 months over any 36-month period. *See* Proposed 22 C.F.R. § 40.41(b).

The DHS Case. In August 2019, plaintiffs in the DHS Case—five nonprofit organizations that serve and advocate for low-income noncitizens—filed a complaint asserting claims under the APA and the Fifth Amendment. In October 2019, the district court granted a preliminary injunction barring enforcement of the DHS Rule. The defendants appealed that injunction. The defendants also moved for a stay of the injunction pending appeal, which was denied by the district court and this Court but was granted by the U.S. Supreme Court in a January 27, 2020 order. The order stayed the injunction until defendants' appeal is resolved and any subsequent petition for a writ of certiorari is disposed of, but did not opine on the

merits. *DHS* v. *New York*, 140 S. Ct. 599 (2020). The DHS Rule went into nationwide effect on February 24, 2020.

On August 4, 2020, a three-judge panel of this Court unanimously affirmed the preliminary injunction issued by the district court in the DHS Case. *New York*, 969 F.3d 42. On October 7, 2020, the defendants filed a petition for a writ of certiorari in the Supreme Court. *See DHS* v. *New York*, No. 20-449 (S. Ct.).

Separately, on July 29, 2020, based specifically on COVID-related concerns, the district court entered a second preliminary injunction barring enforcement of the DHS Rule. On August 12, 2020, this Court narrowed that injunction to apply only in Connecticut, New York, and Vermont. On September 11, 2020, this Court stayed that injunction altogether due to concerns about the district court's jurisdiction to enter it while the defendants' appeal from the first preliminary injunction in the DHS Case was pending.

The DOS Case. In December 2019, the plaintiffs in this case—five nonprofit organizations that serve and advocate for low-income noncitizens and five individuals who are intending immigrants or family members of intending immigrants—filed a complaint asserting claims under the APA, the Fifth Amendment, and the *ultra vires* doctrine. Plaintiffs in this case assert challenges to the IFR and the FAM Revisions, as well as to a proclamation to bar immigrants without "approved" health coverage or sufficient resources from entering the

country issued by President Trump pursuant to 8 U.S.C. § 1182(f) (the "Proclamation") and actions taken by federal officials to implement the Proclamation.

In January 2020, plaintiffs moved to preliminarily enjoin the IFR, the FAM Revisions, the Proclamation, and actions implementing the Proclamation. On July 29, 2020, the district court granted plaintiffs' motion and issued a preliminary injunction barring enforcement of the IFR, the FAM Revisions, the Proclamation, and government actions implementing the Proclamation.

On September 22, 2020—55 days after the district court's ruling—the government filed a notice of appeal of the district court's ruling and requested a stay of the preliminary injunction in the district court. Defendants' stay request, both to the district court and to this Court, is directed *only* at the part of the district court's injunction barring enforcement of the IFR.

On October 7, 2020, immediately after plaintiffs submitted their briefs opposing a stay, defendants filed a waiver of a reply and a hearing. Defendants attempted to set a deadline for the district court to rule, indicating they would seek relief from this Court unless the district court ruled on their motion by October 16, 2020. On October 13, 2020, the district court treated defendants' filing as a motion to set a deadline for the district court to rule and denied defendants' demand.

Defendants filed this motion on October 19, 2020. To date, the district court has not ruled on defendants' motion to stay.

ARGUMENT

"A party seeking a stay of a lower court's order bears a difficult burden." *United States* v. *Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 44 F.3d 1082, 1084 (2d Cir. 1995). The Court considers: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken* v. *Holder*, 556 U.S. 418, 434 (2009). Irreparable harm to the movant and likelihood of success on the merits are the "most critical" factors. *Id.*

I. Defendants' Motion Should Be Denied Because Defendants Failed to Obtain a District Court Decision Prior to Filing

As an initial matter, defendants' motion should be denied because defendants have not given the district court a reasonable opportunity to rule on their stay request. Under Federal Rule of Appellate Procedure 8(a)(2)(A), a motion for a stay pending appeal may be made to the court of appeals only if the movant has previously moved in the district court and the district court has "denied the motion or failed to afford the relief requested," or the movant shows "that moving first in the district court would be impracticable."

Defendants offer no explanation why their motion is excepted from Rule 8(a)(2)(A); they have thus waived any such claims. Defendants' silence is particularly unjustifiable given their own two-month delay before making that motion. This Court should allow the district court to address that motion in the first instance.

II. Defendants Cannot Make the Requisite Strong Showing That They Are Likely to Succeed on the Merits

A. The DOS Interim Final Rule Is Judicially Reviewable

The APA provides for judicial review of a "final agency action," which the IFR undisputedly is, unless a statute precludes judicial review or the agency's action is committed to the agency's discretion by law. 5 U.S.C. §§ 701(a), 704. No statute precludes judicial review of the IFR.

Defendants make the radical claim that the IFR is judicially unreviewable because it is a regulation about immigration. To support their argument, Defendants reference *Fiallo* v. *Bell*, 430 U.S. 787 (1977), where the Supreme Court evaluated whether certain provisions of the INA were unconstitutional. *Id.* at 788-89. The Court did not consider the issue unreviewable. Instead, it "underscore[d] the limited scope of judicial inquiry into immigration *legislation*." *Id.* at 792. *Fiallo* does not speak at all to administrative regulations implementing Congressional legislation pursuant to the APA.

Defendants cite cases stating that Executive determinations to exclude specific individuals from the United States—such as a consular officer's decision to deny a visa application—are generally judicially unreviewable. Mot. at 10-12. Those citations have no application here; plaintiffs have not challenged any *individual* visa decisions. Plaintiffs challenge the legality of a broadly applicable regulation governed by the APA's notice-and-comment procedures that DOS has effectively conceded apply. Nothing in the APA exempts immigration rules, or rules promulgated by DOS, from judicial review. Defendants cite *no* authority for their claim that agency rulemakings about immigration are somehow exempt from that review. Defendants are not likely to prevail on this unprecedented argument.

B. Plaintiffs Have Standing

In its August 4, 2020 decision affirming the preliminary injunction in the DHS Case, this Court found that several of the same organizational plaintiffs in this case had standing to challenge the DHS Rule. *New York*, 969 F.3d at 60-63. On this motion, defendants effectively waived any argument about whether the organizational plaintiffs have demonstrated injury. That alone decides standing. Where there are multiple plaintiffs, only one plaintiff need demonstrate standing for the court to have jurisdiction. *Comer* v. *Cisneros*, 37 F.3d 775, 788 (2d Cir. 1994).

The individual plaintiffs have, in any case, established injury based on the threat that their or their family members' visa applications will be denied if consular officers apply the IFR's public charge framework. *See* Ex. 3, Compl. ¶¶ 43-49. Defendants essentially argue that to bring suit the individual plaintiffs must have effectively purchased a ticket to depart the United States. But plaintiffs bringing pre-enforcement facial challenges to unlawful statutes need demonstrate "only that [they have] 'an actual and well-founded fear that the law will be enforced against' [them]." *Pac. Capital Bank, N.A.* v. *Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008). Plaintiffs' specific allegations have amply met that burden. *See, e.g.*, Ex. 3, Compl. ¶¶ 43-49, 253-54.

Defendants argue that plaintiffs' injuries are not redressable while the DHS Rule remains in effect. This argument—never made to the district court, where, as to standing, defendants argued only that plaintiffs had not established injury—is unsound factually and legally. Defendants suggest that, because the DHS Rule is currently in effect, the individual plaintiffs will remain subject to the DHS Rule at ports of entry and may be turned away by Customs and Border Protection ("CBP") officials when they seek to enter the country after obtaining a visa abroad. Mot. at 4, 13-14, 18-19. This is entirely theoretical. To support this argument, defendants cite sections of the INA that detail the visa and admissibility processes and remind visa applicants that a visa is not a guaranteed ticket to entry into the country. *See*

id. at 4 (citing 8 U.S.C. §§ 1201(h), 1185(d), 1225(a), and 1182(a)(4)). Those provisions do not establish whether, as a practical and factual matter, CBP officials may be performing public charge determinations from scratch when presented with a visa-holder who has already undergone that determination by a consular officer. Defendants—who bear the burden on this motion—provide no support in the record for the conclusion that this often or even *ever* occurs, or that performing fact-intensive public charge inquiries at airports is even logistically possible.

Even if such successive public charge determinations do occur at the border (notwithstanding the absence of any record evidence), this would demonstrate only that plaintiffs might face multiple roadblocks in the immigration system, not that their injuries in *this* case cannot be remedied. "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson* v. *Valente*, 456 U.S. 228, 244 n.15 (1982); *see also Massachusetts* v. *EPA*, 549 U.S. 497, 526 (2007) (petitioners had standing where "risk" of climate change harms "would be reduced to some extent if petitioners received the relief they seek").

C. The DOS Interim Final Rule Is Contrary to the INA and Arbitrary and Capricious

In its August 4, 2020 decision affirming the preliminary injunction in the DHS Case, this Court found it "plain . . . that the [DHS] Rule falls outside the

statutory bounds marked out by Congress" in the INA. *New York*, 969 F.3d at 75. This Court also found the DHS Rule to be arbitrary and capricious in violation of the APA. *Id.* at 81-86.

Defendants concede that this Court's conclusions about the illegality of the DHS Rule apply equally to the IFR. Defendants then assert that the district court's preliminary injunction in this case was in error for "reasons independent of the DHS Rule," but do not discuss those reasons, except to claim that DOS's rationale of "align[ing] its standard with DHS's standard" was "plainly rational." Mot. at 14. It was not. As the district court rightly found, the desire to conform to another agency's rule does not warrant the washing away, without proper deliberation, of decades of precedent for the interpretation of the public charge provision. *See* Mot. Attachment A at 33 (hereafter "Op.").

Defendants argue that the Supreme Court's stay of the DHS Rule suggests the likelihood of their success on the merits in this appeal. But the Supreme Court's order made no findings on the substance of the injunction, the APA claims, or the history of the public charge provision. *New York*, 140 S. Ct. 599; *see also Wolf* v. *Cook Cty., Ill.*, 140 S. Ct. 681, 682 (2020) (Sotomayor, J., dissenting). A stay of the injunction containing no analysis of the merits of plaintiffs' challenge is not sufficient to predict what the Supreme Court might do if it grants certiorari and reviews the full record.

Further, the Supreme Court has never had the opportunity to review plaintiffs' claims that the IFR violated the APA on procedural grounds. There is no basis to assume that the Supreme Court will even review the case on the merits. If reviewed, there is no reason to believe the Supreme Court will allow defendants to simply ignore decades of precedent requiring that federal agencies comply with the APA's procedural requirements.

D. DOS's Rulemaking Was Procedurally Defective

The APA requires an agency to provide for notice-and-comment before issuing a legislative rule. *See* 5 U.S.C. § 553(a)-(d). The "good cause" exception to notice-and-comment applies where "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(A)-(B). That exception is "generally limited to emergency situations, or where delay could result in serious harm." *NRDC* v. *Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018).

Defendants argue there was "good cause" for DOS to skip notice-and-comment for the IFR because of the then-impending effective date of the DHS Rule and the "critical" need to "avoid the application of inconsistent standards" in DHS and DOS public charge determinations. Mot. at 15-16. Defendants do not explain how a desire to harmonize procedures among agencies would constitute an emergency. The visa and admissibility processes "operate in different spheres."

Trump v. *Hawaii*, 138 S. Ct. 2392, 2414 (2018). That distinct rules may exist is inherently contemplated in Congress's division of labor between the agencies.

Here, defendants' "emergency" was self-generated. DHS issued a proposed rule in October 2018, and the final DHS Rule in August 2019. Defendants failed to act during the near-entire *year* in which DHS was considering comments on its public charge rule, and during the *two months* following its release. Instead, they waited until just *four days* before the DHS Rule was to go into effect before publishing the IFR. Defendants suggest that DOS was unable to propose a rule and undergo notice-and-comment "until after DHS issued its final rule." Mot. at 17. But DOS was not obligated to wait to begin its rulemaking process until after DHS's process had ended. It could have acted concurrently and chose not to. As this Court has stated, "[w]e cannot agree . . . that an emergency of [the agency's] own making can constitute good cause." *NRDC*, 894 F.3d at 115.

Defendants cite *American Federation of Government Employees, AFL-CIO* v. *Block*, 655 F.2d 1153 (D.C. Cir. 1981), which is inapposite. In *Block*, a district court had enjoined the U.S. Department of Agriculture ("USDA") from relying on an inconsistent set of guidelines governing inspection rates for poultry processing plants and had ordered USDA to "use uniform rate standards." *Id.* at 1154-55. In response, relying on the "good cause" exception, USDA immediately published final rules establishing uniform inspection rates. *Id.* at 1155-56. Given the district

court's "order to institute uniform inspection rate standards," the *Block* court upheld USDA's reliance on the good cause exception in that "unusual emergency situation." *Id.* at 1154, 1156-57.

Defendants also argue that notice-and-comment for the IFR "would not have served any practical purpose" because there would have been no reason for DOS to vary its rule from DHS's, and that DHS's notice-and-comment period was sufficient for both agencies. Mot. at 17. Not so. The suggestion that DOS could engage in a rubberstamp rulemaking on the heels of another agency has no legal basis. Each agency's Congressionally delegated authority is its own. *See U.S. Telecom Ass'n* v. *FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) ("subdelegations" of an agency's authority "to outside parties are assumed to be improper"). DOS was obligated to conduct a procedurally and substantively valid rulemaking when it promulgated the IFR. Instead, as defendants admit, it chose simply to tag along behind a separate agency's promulgation of a separate rule. No good cause exists for that defective process.

III. Defendants Cannot Show Irreparable Harm

Defendants have not established irreparable harm. *First*, any purported urgency is belied by defendants' two-month delay in seeking a stay. *Cf. Levola* v. *Fischer*, 403 F. App'x 564, 565 (2d Cir. 2010) ("[A] party's delay in seeking an

injunctive relief severely undermines [its] argument that absent a stay irreparable harm will result.").

Defendants suggest that they had no reason to move for a stay until September 11, 2020, when the district court stayed the second preliminary injunction in the DHS Case. Mot. at 6, 9. That argument does not square with the record. On *August 12, 2020*, this Court narrowed the second preliminary injunction in the DHS Case to three states. On September 11, 2020, this Court stayed the second preliminary injunction altogether. As of the *earlier* of those dates—41 days before defendants moved for a stay—there was a "lack of alignment" between the DHS Rule and the IFR in 47 states. Defendants' justifications for their delay ring hollow.

Second, the Court should reject defendants' argument that the injunction of the IFR somehow impairs the authority delegated to defendants by Congress. Defendants' citation to *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers), is inapposite. In that case, there were no allegations of harm to an administrative agency. *See id.*

Third, defendants' arguments about a lack of "alignment" between the DHS Rule and the IFR do not amount to irreparable harm. For one, the lack of alignment between DHS and DOS public charge policies is nothing new. When defendants adopted the January 2018 FAM revisions expanding public charge

consideration to noncash benefits, DHS was still using the 1999 Field Guidance. Over the past 33 months, since January 2018, the two agencies' policies have been the *same* during only the five-month period from February 24, 2020 through July 29, 2020. Defendants offer no factual basis for their purely speculative claim that differing standards will result in conflicting determinations by consular officers and CBP officials. They cite no examples of intending immigrants who were "deemed inadmissible on the public-charge ground" after obtaining visas abroad. Mot. at 18. Nor do defendants show that CBP is making independent public charge determinations at any point of entry.

Assuming *arguendo* harm to defendants from a lack of alignment between DHS and DOS policies, a stay of the district court's injunction is no more likely to ensure consistency between those policies in the near term than a denial. The Supreme Court's stay of the district court's preliminary injunction barring enforcement of the DHS Rule has been in place for ten months already. *See New York*, 140 S. Ct. 599. By now, this Court has affirmed that injunction, *see New York*, 969 F.3d 42, and the defendants have filed a petition for a writ of certiorari, *see DHS* v. *New York*, No. 20-449 (S. Ct.). If the Supreme Court denies that petition, the stay of the DHS Rule injunction will automatically terminate. *New York*, 140 S. Ct. 599. If that happens, and the preliminary injunction of the IFR is meanwhile stayed, under defendants' unsupported theory of how visa and

admissibility determinations work, an opposite inconsistency would result, where individuals might be eligible for admission into the country but unable to obtain a visa. Defendants do not explain why that situation would cause any less harm.

As this Court has found, for decades, the public charge provisions had a settled meaning. *See New York*, 969 F.3d at 74-80. The district court's injunction simply returns DOS to the longstanding regime for considering public charge as a basis for visa issuance. Enjoining defendants from adopting a dramatic, unwarranted change in that settled practice is not irreparable harm. *See Washington* v. *Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017).

IV. The Harms to Plaintiffs and The Public Interest Disfavor a Stay

The district court found that, absent an injunction, both individual and organizational plaintiffs face immediate and irreparable harm. *See* Op. at 48 (citing "extensive reports of the adverse consequences that implementation of the 2018 FAM Revisions, DOS Rule, and Proclamation will have on Plaintiffs, as well as on Individual Plaintiffs' families, Organizational Plaintiffs' clients, immigrant communities throughout the country, and the general public"). The Court also found that the "ongoing COVID-19 pandemic highlights the potentially devastating effects that the government's new public charge framework could have on public health and safety," including that "the new public charge framework continues to have a chilling effect on immigrants, who have foregone coronavirus-

related medical care to which they are legally entitled out of fear that seeking such care will jeopardize their immigration status." *Id.* at 49.

Defendants do not contest the district court's findings that enforcement of the IFR will harm the public. *See* Op. at 48. Instead, defendants audaciously claim that certain members of the public—"aliens and the organizations who represent them"—will be harmed if the IFR is not stayed due to "confusion" from "inconsistent determinations." Mot. at 19-20. Plaintiffs, who are among those "aliens and the organizations who represent them," vehemently disagree. Unlike defendants, who offer baseless speculation on plaintiffs' behalf, plaintiffs have submitted evidence of their harms. The harm to intending immigrants and the organizations that assist them stem from enforcement of the IFR and the burden of educating clients about its particularities, not from the injunction barring it.

Defendants argue that individual plaintiffs cannot demonstrate irreparable harm because they "have not established that they will be subject to the [IFR] in the near future." Mot. at 19 n.3. But individual plaintiffs need only show "a *threat* of irreparable harm," *Mullins* v. *City of New York*, 626 F.3d 47, 55 (2d Cir. 2010), which they have done.

Defendants also argue that no plaintiff faces irreparable harm from enforcement of the IFR so long as the DHS Rule remains in effect. Mot. at 18. Defendants reiterate their argument that individual plaintiffs may be deemed

inadmissible at ports of entry even if they obtain visas abroad. Again, defendants provide no fact-based explanation of whether this is likely to occur. Even if it were to occur, that would mean only that there may be multiple harms affecting plaintiffs. The standard for justifying relief is irreparable harm, not a showing that an injunction will cure all injury.

V. The District Court's Nationwide Injunction Should Remain in Place Pending an Appeal on the Merits

The district court properly concluded a nationwide injunction is necessary to afford plaintiffs and other interested parties complete redress, especially given the unworkability of a domestically piecemeal injunction that would apply to consular offices all over the world. Op. at 50-51.

This Court's August 4, 2020 decision affirming the preliminary injunction in the DHS Case is not a basis for staying or narrowing the injunction in this case. In that decision, this Court cautioned that nationwide injunctive relief may be "less desirable" when courts in multiple jurisdictions consider the same issue, as was the case there. *New York*, 969 F.3d at 88. No such circumstances are presented here, as no other pending cases or motions seek to preliminarily enjoin the IFR. While defendants cite *Mayor & City Council of Baltimore* v. *Trump*, No. 18-cv-3636 (D. Md.), the plaintiffs there are not seeking preliminary injunctive relief. If the District of Maryland were to rule in the defendants' favor, nothing would prevent defendants from then arguing for a modification of the injunction's scope here.

Defendants argue that injunctive relief should be limited to the named plaintiffs. Mot. at 20. This argument fails to account for the realities of plaintiffs' operations. Plaintiff CLINIC operates in 49 states and the District of Columbia, *see* Ex. 4, Decl. of Charles Wheeler ¶ 3, and all plaintiffs serve immigrants who may move in and out of New York, and who interview at consulates all over the world regardless of the state they return to. As this Court has recognized, there is no bar to nationwide injunctions in appropriate circumstances. *New York*, 969 F.3d at 87-88.

CONCLUSION

The Court should deny defendants' motion.

Dated: New York, New York
October 29, 2020

By: */s/ Andrew J. Ehrlich*

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Attorneys for Plaintiffs-Appellees Make the Road New York, African Services Committee, Central American Refugee Center New York, Catholic Charities Community Services (Archdiocese of New York), Catholic Legal Immigration Network, Inc., Alicia Doe, Brenda Doe, Carl Doe, Diana Doe, and Eric Doe

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Andrew J. Ehrlich, counsel for Plaintiffs-Appellees Make the Road New York, African Services Committee, Central American Refugee Center New York, Catholic Charities Community Services (Archdiocese of New York), Catholic Legal Immigration Network, Inc., Alicia Doe, Brenda Doe, Carl Doe, Diana Doe, and Eric Doe, and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 27(d), that Plaintiffs-Appellees' attached Response to Motion for a Stay Pending Appeal is proportionately spaced, was prepared in 14-point Times New Roman font, and contains 5,196 words.

/s/ *Andrew J. Ehrlich*
Andrew J. Ehrlich

October 29, 2020

CERTIFICATE OF SERVICE

I, Andrew J. Ehrlich, counsel for Plaintiffs-Appellees Make the Road New York, African Services Committee, Central American Refugee Center New York, Catholic Charities Community Services (Archdiocese of New York), Catholic Legal Immigration Network, Inc., Alicia Doe, Brenda Doe, Carl Doe, Diana Doe, and Eric Doe, and a member of the Bar of this Court, certify that, on October 29, 2020, a copy of the attached Response to Motion for a Stay Pending Appeal was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ *Andrew J. Ehrlich*
Andrew J. Ehrlich

October 29, 2020