No. 20-2537

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, et al.,
Plaintiffs-Appellees,
v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants-Appellants.

MAKE THE ROAD NEW YORK, et al.,
Plaintiffs-Appellees,
v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants-Appellants.

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

APPELLANTS' REPLY IN SUPPORT OF MOTION FOR A STAY PENDING APPEAL AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

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INTRODUCTION AND SUMMARY

Plaintiffs' oppositions merely confirm the true nature of the injunction at issue here: an effort to override, as a practical matter, the Supreme Court's stay of the prior injunctions. As this Court recognized, the Supreme Court's stay lasts "not only through [this Court's] disposition of the case, but also through the disposition of DHS's petition for a writ of certiorari, should DHS seek review of [this Court's] decision." *New York v. U.S. Dep't of Homeland Sec.*, -- F.3d --, Nos. 19-3591, 19-3595, 2020 WL4457951, at *32 (2d Cir. Aug. 4, 2020). The district court thus asserted authority to do what this Court could not—rendering the injunction effective again, even before the Supreme Court has a chance to engage in plenary review.

Plaintiffs offer no response to the government's observation—confirmed by this Court—that most people affected by the Rule will be ineligible for public benefits, so the effects plaintiffs highlight result from confusion rather than application of the Rule itself. Plaintiffs do not explain why a temporary injunction will combat that confusion in a way that guidance regarding the Rule's scope could not. And like the district court, plaintiffs fail to address the changed circumstances that render an injunction less appropriate than before, such as the fact that this injunction alters the status quo.

The States rightly do not even attempt to defend the injunction's geographic scope. The organizational plaintiffs' efforts to do so are without merit, and illustrate that plaintiffs are seeking to supersede, as a practical matter, not only the Supreme

Court's stay in this case, but also the Supreme Court's separate stay in a case arising out of the Seventh Circuit, the Fourth Circuit's ruling on the merits after plenary review, and the Ninth Circuit's issuance of a stay. They should not be permitted to do so.

ARGUMENT

I. The Injunction Impermissibly Seeks to Override the Supreme Court's Stay Order

A. As an initial matter, the new injunction flouts the rule that district courts lack jurisdiction to alter the order on appeal. *United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996). The district court could "focus[] entirely on new facts" in issuing a new preliminary injunction, States Opp'n 15, only by adopting wholesale its prior merits reasoning, *see* Op. 22; *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits."). Plaintiffs likewise omit any discussion of the merits and simply cross-reference this Court's prior opinion. *See* States Opp'n 13-14.

Plaintiffs' reliance on *International Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Eastern Air Lines, Inc.*, 847 F.2d 1014 (2d Cir. 1988), is fundamentally misplaced. That case is relevant only insofar as it sets out the general rule that district courts may "grant only such relief as may be necessary to preserve the status quo pending an appeal where the consent of the court of appeals has not been obtained."

Id. at 1018.[1] That rule applies with special force here because the district court's new preliminary injunction has the effect of circumventing a Supreme Court stay. The injunction at issue here plainly does more than preserve the status quo, and the special circumstances of *International Ass'n of Machinists*—where both parties consented to treat the new motion "as a new action" and to treat the "motion to vacate the injunction as an appeal," 847 F.3d at 1018—are not present here.

Plaintiffs are likewise mistaken to rely, without explanation, on cases where a district court issued a *permanent* injunction while an appeal from a *preliminary* injunction was pending. *See* States Opp'n 15-16 (citing *Webb v. GAF Corp.*, 78 F.3d 53, 55 (2d Cir. 1996)). The district court did not advance the litigation here by proceeding to final judgment, but merely reissued the preliminary injunction that was already on appeal. *See* Mot. 10.

Plaintiffs alternatively seek to dismiss any jurisdictional "concerns" based on this Court's ruling on the merits of the original preliminary-injunction appeal. States Opp'n 16. But appellate review does not end with a panel decision of this Court. If the district court had wanted to obtain "congruence" with this Court's decision, *id.*, it would have abided by the Supreme Court's determination that the Rule should remain in effect "not only through [this Court's] disposition of the case, but also through the

[1] That practice was subsequently formalized in 2009 through the adoption of Rule 62.1 of the Federal Rules of Civil Procedure. *See* Wright & Miller, 11 Federal Practice and Procedure § 2873 (3d ed. 2020).

disposition of DHS's petition for a writ of certiorari, should DHS seek review of [this Court's] decision." *New York*, 2020 WL4457951, at *32. The district court did not conform to this Court's decision—which had recognized that the Supreme Court had made clear that its stay should remain in effect even if this Court affirmed the preliminary injunction—but instead asserted authority greater than that exercised by this Court.

Plaintiffs highlight the anomalous nature of their request by suggesting this Court could "remedy . . . any jurisdictional defect" by "simply remand[ing] so that the district [court] may reissue its second injunction." States Opp'n 16. Plaintiffs presumably do not mean that the district court would amend its earlier injunctions. Instead, plaintiffs have in mind a remand to replace the stayed injunction with a new one that has not been stayed. The indicative-ruling procedure is not designed to allow parties to evade the Supreme Court's rulings in this fashion, and plaintiffs cite no authority for the surprising proposition that the district court would have greater authority, on remand from this Court, than this Court could exercise itself.

Plaintiffs' desire to gloss over the Supreme Court's decision also infects their discussion of the merits. Plaintiffs reiterate, without explanation, their mistaken view that the Supreme Court's "stay says nothing about the merits." States Opp'n 14. As previously explained, the Supreme Court necessarily addressed the likelihood of success on the merits in concluding that the government was entitled to a stay. *See* Mot. 11-13. While the Supreme Court's stay is not a "definitive adjudication on the

merits," the district court was not entitled to ignore the implications of the Supreme Court's decision entirely. *See CASA de Maryland v. Trump*, -- F.3d --, No. 19-2222, 2020 WL 4664820, at *1 (4th Cir. Aug. 5, 2020) ("every maxim of prudence" counsels against "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").

As already explained, Mot. 13, plaintiffs overread the Supreme Court's order refusing to modify its stay when they assert that it "expressly contemplated plaintiffs returning to the district court to seek relief based on COVID-19." States Opp'n 29. The Supreme Court merely stated that the denial of plaintiffs' motion to modify the stay "does not preclude a filing in the District Court as counsel considers appropriate." *Department of Homeland Sec. v. New York*, No. 19A785, 2020 WL 1969276, at *1 (U.S. Apr. 24, 2020). The observation that the order declining to lift the stay would not itself foreclose plaintiffs from making future district-court filings was not an invitation for the district court to ignore the necessary implications of the Supreme Court's prior stay—a stay that plaintiffs themselves conceded left "substantial doubt as to whether the lower courts could provide" new injunctive relief. Mot. to Lift or Modify Stay at 16, *U.S. Department of Homeland Sec. v. New York*, No. 19A785 (U.S. Apr. 13, 2020). Plaintiffs provide no response to this point, and do not even discuss the actual text of the Supreme Court's order.

B. Plaintiffs also dramatically overstate the degree to which the district court's new injunction was a new ruling based on new circumstances, as opposed to an effort to reinstate the injunction that the Supreme Court stayed. Plaintiffs assert that the new injunction was warranted to ensure that immigrants would not be deterred from seeking public benefits in light of the COVID-19 pandemic. As we previously explained, this Court has already recognized that "'the vast majority of non-citizens' to whom the Rule could potentially apply 'will not have been eligible to receive any of the relevant public benefits (and therefore presumably will not have received such benefits) at the time the Rule is applied.'" Mot. 17 (quoting *New York*, 2020 WL 4457951, at *6). And the number of people potentially affected has been lessened further by the DHS alert that makes clear that any receipt of public benefits in order to obtain treatment or other medical services related to COVID-19 will not be considered as part of a future public charge inadmissibility determinations. *See* Op. 25. Accordingly, the degree to which the Rule itself—as opposed to misunderstandings of the Rule—affects individuals' responses to COVID-19 is minimal.

Plaintiffs do not seriously suggest otherwise, instead urging that some aliens have declined to use even the services specifically identified by the alert, and failing altogether to distinguish between aliens who would be covered by the Rule and aliens who would not. *See, e.g.*, States Opp'n 23-24. Although they argue—as they did before—that harm caused by confusion about the Rule should be counted against the

Rule, they fail to establish that a new injunction would materially alter that confusion. Instead, they assert, without citation or explanation, that the injunction "will provide needed clarity and confidence." States Opp'n 27. Plaintiffs make no effort to explain why a temporary injunction, which is by its terms time limited and subject to revision, or reversal, or stay at any time, will provide the "clarity and confidence" that was elusive despite (1) the Rule's complete inapplicability to most aliens who would actually be considering obtaining public benefits; and (2) DHS's explicit statement that public benefits related to COVID-19 testing and treatment would not be considered for purposes of the Rule.

The public would be better served if plaintiffs joined with DHS in clarifying the circumstances in which the Rule applies, rather than suggesting that an injunction is needed to allow aliens to engage in activities that would not be affected by the Rule in any event. But perhaps more relevant for present purposes, plaintiffs' insistence that changed circumstances justify exactly the same injunction that the district court issued before (other than the time limit) illustrates that the district court simply provided new reasons for the old injunction, rather than establishing that a new injunction was warranted.

Moreover, neither plaintiffs nor the district court have even attempted to address the changed circumstances that cut in the other direction. The confusion associated with the public-charge rule will only be amplified by an injunction halting application of the Rule after the Rule took effect—an issue that was not presented by

the prior preliminary injunction and that any serious new assessment would need to take into account. And the harm to the government is likewise greater when the status quo is changing. *See* Mot. 16.

II. At a Minimum, the Injunction Should be Limited to the Plaintiff States

This Court temporarily stayed the district court's injunction "with respect to all states other than those within the Second Circuit," "pending resolution by the panel assigned to decide the motion." Order, Aug. 12, 2020. As discussed above, the injunction should be stayed in its entirety. But at an absolute minimum, that partial stay should be extended.

The States do not even attempt to defend the geographic scope of the district court's new injunction. And the organizational plaintiffs' defense of the nationwide injunction is unpersuasive.

As the organizational plaintiffs recognize, this Court has twice exercised its discretion to limit nationwide injunctions against the Rule—once in its published opinion in the prior appeal and once in issuing a temporary partial stay. They argue that circumstances have changed because the panel's decision was based in part on the pendency of other cases addressing the Rule, and now "[t]here are no other pending cases or motions seeking to enjoin the Rule based on the impact of the pandemic, and no other court decisions rejecting such an injunction." Organizational Pls.' Opp'n 7. There are, of course, still other cases challenging the Rule, and the fact that plaintiffs

in those other cases have not sought the extraordinary and improper relief obtained here does not help plaintiffs' case.

This Court previously concluded that a nationwide injunction of the Rule is not appropriate. If anything, the concerns that prompted that conclusion weigh heavier against a nationwide injunction now. The Fourth Circuit has now addressed the merits of plaintiffs' challenge to the Rule, and held that the Rule is "clearly" lawful. *See CASA de Maryland*, 2020 WL 4664820, at *23. Because an injunction can only issue if plaintiffs demonstrate a likelihood of success on the merits, *Winter*, 555 U.S. at 20, and plaintiffs properly do not urge that the pandemic has any effect on the merits of this dispute—which concerns a Rule promulgated before the pandemic began—no injunction like the one at issue here could issue within the Fourth Circuit.

Similarly, the Ninth Circuit has issued a stay of injunctions issued within its boundaries, concluding that the government had established a "strong likelihood of success on the merits" of its appeal. *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773, 781 (9th Cir. 2019). The Seventh Circuit has now affirmed a preliminary injunction, limited to the State of Illinois. *Cook County v. Wolf*, 962 F.3d 208, 215 (7th Cir. 2020). *But see id.* at 234-235 (Barrett, J., dissenting). As in this case, however, that injunction was stayed by the Supreme Court pending the resolution of any petition for a writ of certiorari. *See Wolf v. Cook County*, 140 S. Ct. 681 (2020).

In short, this Court's conclusion in the prior appeal that a nationwide injunction was not warranted was correct (in addition to being binding circuit precedent), and the "volatile litigation landscape" concerning the legality of the public charge rule, *New York*, 2020 WL 4457951, at *32, has only become more volatile. The nationwide preliminary injunction issued here, like the nationwide injunction this Court rejected in its prior appeal, supersedes contrary rulings of numerous courts—invalidating the Rule even in circuits where it has been upheld, and overriding the Supreme Court's stay in Illinois.

Plaintiffs' suggestion that there is a substantive difference between this appeal and the last one is premised on the assertion that the temporary injunction issued by the district court will help to prevent the interstate spread of COVID-19. The unproven presumptions discussed above regarding the effect of a temporary injunction on aliens who are not affected by the Rule are even more tenuous when the injunction in question was issued by a district court on the opposite side of the country whose authority to craft legal rules for far-away States has repeatedly been called into question. Concerns about judicial comity far outweigh any benefit of attempting to limit the spread of COVID-19 within the plaintiff States by influencing the behavior of people outside of those States through a temporary injunction of a Rule that, in the vast majority of cases, does not actually apply to those people to begin with.

CONCLUSION

The motion for a stay should be granted.

Respectfully submitted,

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August 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,562 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Jack Starcher
Jack Starcher

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2020, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Jack Starcher
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