

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-2537

Caption [use short title]

Motion for: Emergency Stay of Preliminary Injunction
 Pending Appeal and Request for Immediate Administrative
 Stay

Set forth below precise, complete statement of relief sought:

Stay of the district court's July 29 order--which issued a new nationwide preliminary injunction enjoining the Department of Homeland Security's August 2019 Rule defining a "public charge" for purposes of 8 U.S.C. § 1182(a)(4)--pending completion of the government's appeal. In addition, the government seeks an administrative stay while the Court considers the stay motion.

MOVING PARTY: U.S. Dep't Homeland Security, et al.

OPPOSING PARTY: State of New York, et al.

Plaintiff Defendant

Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Jack Starcher

OPPOSING ATTORNEY: See addendum

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Court- Judge/ Agency appealed from: Southern District of New York - George B. Daniels, J.

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

Yes No (explain): _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Opposing counsel's position on motion:

Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:

Yes No Don't Know

Yes No
 Yes No

Is oral argument on motion requested?

Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

Yes No If yes, enter date: _____

Signature of Moving Attorney:

/s/ Jack Starcher Date: 8/7/2020 Service by: CM/ECF Other [Attach proof of service]

Addendum to Form T-1080

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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' EMERGENCY MOTION FOR A STAY PENDING APPEAL AND
REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY**

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INTRODUCTION AND SUMMARY

The federal government respectfully requests a stay pending its appeal of the district court’s preliminary injunction requiring the Department of Homeland Security (DHS) to unwind implementation of a rule interpreting the statutory provision that renders inadmissible any alien who DHS determines is “likely at any time to become a public charge.” 8 U.S.C. § 1182(a)(4)(A); *see Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019). And because the district court’s injunction has unsettled the status quo, the government also requests an immediate administrative stay while the Court considers the government’s motion for stay pending appeal.

The district court had previously issued preliminary injunctions against the Rule in these cases (before they were consolidated), but the Supreme Court stayed them. *Department of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (mem.). Indeed, each of the five preliminary injunctions issued against the Rule has been stayed, either by the courts of appeals or by the Supreme Court. *See Wolf v. Cook County*, 140 S. Ct. 681 (2020); *City & County of San Francisco v. USCIS*, 944 F.3d 773 (2019); Order, *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019). The Rule had therefore been implemented since February 24, 2020.

Despite that history, and despite the fact that an appeal of the original preliminary injunctions was pending in this Court, the district court here issued a new preliminary injunction preventing DHS from enforcing the Rule, and gave that injunction nationwide scope. The court justified a new preliminary injunction against

the same Rule in the same cases based on the same merits argument by stating that the COVID-19 pandemic heightens the irreparable harms plaintiffs and the public face under the Rule. Plaintiffs had previously asked the Supreme Court to temporarily lift or modify its stay in these cases for the same reasons, but the Supreme Court denied that motion (stating that its order did not preclude plaintiffs from filing in the district court). *Dep’t of Homeland Sec. v. New York*, 2020 WL 1969276, at *1 (Apr. 24, 2020) (mem.).

The circumstances on which the district court relied provide no basis for effectively reviving the injunctions that the Supreme Court has stayed. In issuing its stay, the Supreme Court “necessarily conclude[d]” that plaintiffs were unlikely to succeed on the merits. Slip Op. 6, *Casa de Maryland v. Trump*, No. 19-2222 (4th Cir. Aug. 5, 2020); *see Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers); *Nken v. Holder*, 556 U.S. 418, 434 (2009). The COVID-19 pandemic has no bearing on plaintiffs’ likelihood of success on the merits, and the district court did not suggest otherwise. That alone should have precluded the issuance of a new injunction. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

The district court was wrong to suggest that the COVID-19 pandemic has changed the equities such that a preliminary injunction is more necessary now than it was when the Supreme Court stayed the earlier injunctions. Indeed, the district court pointed to no evidence suggesting that an injunction will actually remedy the harm that plaintiffs claim—harm that flows almost exclusively (as plaintiffs own evidence

shows) from misunderstandings about the Rule’s current and future effects, which the district court offered no reason to think the injunction will redress. The Rule should remain in effect pending review of the original injunctions, including any Supreme Court review, as the Supreme Court contemplated when it issued the earlier stay.

This Court’s recent decision affirming the district court’s original preliminary injunctions does not change that conclusion. As this Court acknowledged, its opinion diverges from decisions issued by other courts of appeals regarding the merits of plaintiffs’ claims, making it all the more likely that the Supreme Court will ultimately grant certiorari on the issues raised in these cases. And as the Supreme Court has already indicated by granting its stay, there is a fair prospect that a majority of the Justices will ultimately agree with the government’s position on appeal.

The remaining factors likewise weigh in favor of a stay. As the Supreme Court necessarily concluded in issuing its stay, the government will suffer irreparable harm if the Rule is enjoined. While the Rule is enjoined, the government will grant lawful permanent status to aliens who would be determined to be likely to become public charges under the Rule. Any harm plaintiffs might experience does not constitute irreparable injury sufficient to outweigh that harm to the federal government and taxpayers. Indeed, the case for allowing the Rule to remain in effect has only gotten stronger since the Supreme Court issued its stay: The Rule has now been in effect for more than five months, and a stay pending appeal would preserve that status quo.

At the very least, this Court should limit the preliminary injunction’s scope—as it limited the previous injunctions’ scope—because a nationwide injunction is far broader than necessary to remedy the plaintiffs’ alleged injury. *See Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

STATEMENT

1. The Immigration and Nationality Act (INA) provides that “[a]ny alien who, . . . 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)(A).¹ That assessment “shall at a minimum consider the alien’s (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills.” *Id.* § 1182(a)(4)(B). Under a separate provision, an admitted alien is deportable if, within five years of entry, the alien “has become a public charge from causes not affirmatively shown to have arisen” within that time. *Id.* § 1227(a)(5).

2. Congress has never defined the term “public charge,” instead leaving the term’s definition and application to the Executive’s discretion. The challenged Rule is the first notice-and-comment rule to define the term. A never-finalized rule proposed in 1999 would have defined “public charge” to mean an alien “who is likely to

¹ The statute refers to the Attorney General, but in 2002, Congress transferred the Attorney General’s authority to make inadmissibility determinations in the relevant circumstances to the Secretary of Homeland Security. *See* 8 U.S.C. § 1103; 6 U.S.C. § 557.

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). Simultaneously issued “field guidance” adopted the proposed rule’s definition. 64 Fed. Reg. 28,689 (May 26, 1999) (1999 Guidance).

In August 2019, DHS promulgated the Rule at issue. The 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.* As DHS explained, the Rule’s definition of “public charge” differs from the 1999 Guidance’s definition in that: (1) it incorporates certain noncash benefits; and (2) it replaces the “primarily” dependent standard with the 12-month/36-month measure of dependence.

The Rule also sets forth a framework for evaluating whether, considering the “totality of the alien’s circumstances,” the alien is “[l]ikely at any time in the future 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.*

3. Plaintiffs filed two separate challenges to the Rule—since consolidated—alleging that the Rule is not a permissible construction of “public charge,” is arbitrary and capricious, violates the Rehabilitation Act, and violates equal protection principles. On October 11, 2019, the district court granted plaintiffs’ motions for nationwide preliminary injunctions barring DHS from implementing the Rule. *See New York*, ECF Nos. 109, 110; *Make the Road*, ECF Nos. 146, 147. On January 27, 2020, the Supreme Court stayed the nationwide injunctions in their entirety, “pending disposition of the Government’s appeal in the United States Court of Appeals for the Second Circuit and disposition of the Government’s petition for a writ of certiorari, if such writ is timely sought.” *New York*, 140 S. Ct. at 599. On August 4, 2020, this Court issued a decision limiting the nationwide scope of the district court’s preliminary injunctions and affirming the injunctions as so limited. *See New York v. U.S. Dep’t of Homeland Sec.*, 2020 WL 4457951 (2d Cir. Aug. 4, 2020). But the Supreme Court’s stay of the original preliminary injunctions remains in effect. *See id.* at *32.

Four other district courts also issued injunctions against the Rule, all of which have also been stayed. The Ninth Circuit granted the government’s motions for stays pending appeal in the cases pending in that circuit. *See City & County of San Francisco v. USCIS*, 944 F.3d 773 (2019). The Fourth Circuit also granted a stay pending appeal of the nationwide injunction entered by a district court in Maryland. *See Order, Casa de Maryland, Inc. v. Trump*, No. 19-2222 (Dec. 9, 2019). The Fourth Circuit has since reversed the preliminary injunction entered by the Maryland district court, holding

that term “public charge” has no fixed meaning, and that the Rule’s definition falls well within DHS’s discretion to define that term. Slip Op. 29-48, *Casa de Maryland v. Trump*, No. 19-2222 (Aug. 5, 2020).

Although the Seventh Circuit denied a stay of an injunction issued by a district court in Illinois and denied the government’s renewed motion after the Supreme Court’s stay issued in these cases, the Supreme Court then stayed that injunction. *Wolf v. Cook County*, 140 S. Ct. 681 (2020). A Seventh Circuit panel subsequently affirmed the Illinois preliminary injunction. *Cook County, Illinois v. Wolf*, 962 F.3d 208 (7th Cir. 2020). The government’s petition for rehearing en banc remains pending, and the Supreme Court’s stay of the Illinois preliminary injunction remains in effect.

Because all preliminary injunctions had been stayed by the Supreme Court or courts of appeals, the Rule went into effect on February 24, 2020.

4. In April 2020, plaintiffs filed a motion in the Supreme Court seeking to temporarily lift or modify its stay of the district court’s injunctions, arguing that the COVID-19 pandemic intensified the irreparable harms caused by the Rule. *See Mot. to Lift Stay at 21-22, U.S. Dep’t of Homeland Sec. v. New York*, No. 19A785 (S. Ct.). Plaintiffs stated that they were seeking relief directly from the Supreme Court because there was “substantial doubt” as to whether the district court had authority to “provide any meaningful relief given the [Supreme] Court’s stay.” *Id.* at 16. The Supreme Court denied plaintiffs’ motion and stated that the Court’s “order does not

preclude a filing in the District Court as counsel considers appropriate.” *See New York*, 2020 WL 1969276, at *1.

Plaintiffs then filed a motion in district court seeking a new preliminary injunction, again relying on the COVID-19 pandemic. Three months later, the district court granted plaintiffs’ motion and issued a nationwide injunction for the duration of the national emergency associated with the COVID-19 pandemic. Op. 31 (attached). The district court acknowledged that plaintiffs’ motion raised legal issues that were already pending before this Court on appeal from the district court’s earlier preliminary injunctions. Op. 20. But the district court nevertheless concluded that it had jurisdiction to issue a new preliminary injunction, analogizing to cases where district courts issue permanent injunctions while appeals of preliminary injunctions are still pending in the court of appeals. *Id.* In the alternative, the district court stated that its opinion would serve as an indicative ruling “[s]hould the Second Circuit determine” that the district court did not have jurisdiction to issue a new preliminary injunction. Op. 31.

The district court also concluded that a new preliminary injunction would not be contrary to the Supreme Court’s stay of the original preliminary injunction. The court reasoned that there was “no indication that the Supreme Court disagreed with the district court’s earlier analysis of the merits of Plaintiffs’ case.” Op. 21. Turning to the equities, the court concluded that the COVID-19 pandemic heightens the harms caused by the Rule because the Rule may deter aliens from seeking testing and

treatment for COVID-19, Op. 22-23, dismissing as inadequate USCIS guidance that clarifies that aliens will not be penalized for utilizing public benefits to obtain “testing, treatment, [or] preventative care . . . related to COVID-19.” Op. 25-28.

The government sought a stay from the district court on August 3, and informed that court that it would seek relief from this Court if the court had not acted by August 6. We will inform this Court promptly if the district court rules.

ARGUMENT

I. The District Court’s Injunction Cannot Be Squared With The Supreme Court’s Stay Order

1. The district court was not writing on a blank slate in this case. The district court had already issued nationwide preliminary injunctions preventing defendants from implementing the Rule, and the Supreme Court had already issued a stay of those injunctions, allowing defendants to implement the Rule during appellate review of the injunctions, including any Supreme Court review.

In issuing its stay, the Supreme Court necessarily reviewed the claims at issue in these cases and concluded both (1) that defendants have a fair prospect of success on the merits and (2) that defendants will likely suffer irreparable harm absent a stay of the district court’s preliminary injunctions. *See Conkright*, 556 U.S. at 1402; *Nken*, 556 U.S. at 434.

Neither plaintiffs nor the district court has asserted that COVID-19 has changed anything with regard to these two determinations. The district court relied

on its prior merits ruling and properly did not suggest that events after the closure of the administrative record (including the COVID-19 pandemic) affect the Rule’s validity. *See* Op. 22 (“[T]his Court has already found that Plaintiffs are likely to succeed on the merits of their claims.”). And the court did not suggest that any recent developments had diminished the government’s harm. *Cf.* Op. 28-29. Thus, the new injunction is entirely premised on the district court’s conclusion that the balance of harms—which the court had already held favored plaintiffs—were sufficiently altered by the COVID-19 pandemic to warrant a new injunction notwithstanding the Supreme Court’s stay of the old ones.

That was error. In issuing the new injunction, the district court was not, as it suggested, simply “advanc[ing] [the] case despite a pending interlocutory appeal,” akin to “issu[ing] a permanent injunction despite a pending appeal from an order granting a preliminary injunction.” Op. 20. Rather, the court issued another *preliminary* injunction, which was expressly designed to reverse, as a practical matter, the Supreme Court’s determination that the Rule should remain in effect while litigation with respect to the earlier preliminary injunctions proceeds—even if the courts of appeals affirm the preliminary injunctions.

What’s more, the new preliminary injunction necessarily turns on issues that were pending on appeal before this Court at the time the injunction was issued, including plaintiffs’ likelihood of success on the merits and the degree of irreparable harm an injunction blocking the Rule will cause to the government. The idea that a

district court can simply rebalance the harms and reissue an injunction while an appeal is pending cannot be reconciled with the principle that an appeal to this Court deprives the district court of jurisdiction to alter the order on appeal. As this Court has recognized, that principle is “designed to avoid confusion or waste of time resulting from having the same issues before two courts at the same time”—the exact problem that the district court’s order creates. *United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996) (quotation marks omitted). Indeed, the district court acknowledged the potential that a higher court might determine that the district court “does not presently have jurisdiction to issue this injunction,” and therefore issued a Rule 62.1 indicative ruling in the alternative. Op. 31. And plaintiffs likewise acknowledged to the Supreme Court that there was “substantial doubt” whether the district court could “provide any meaningful relief” in light of the Supreme Court’s stay. Mot. to Lift Stay 16.

Even apart from the jurisdictional defect, the district court’s renewed injunction gave impermissibly short shrift to the Supreme Court’s ruling. The district court implausibly suggested that the Supreme Court’s earlier stay of its preliminary injunctions provided “no indication that the Supreme Court disagreed with [the district court’s] analysis of the merits of Plaintiffs’ case.” Op. 21. But the premise of the government’s stay application in the Supreme Court was that plaintiffs had not demonstrated any likelihood of success on the merits, *see Application for Stay of Injunction at 17-30, Dep’t of Homeland Sec. v. New York*, No. 19A785 (Jan. 13, 2020) (S.

Ct.), and the Supreme Court necessarily held that there was a fair prospect that the government would succeed on that claim, *Conkright*, 556 U.S. at 1402. Moreover, the stay here was granted by the whole Court, not a single Justice. *See New York*, 140 S. Ct. at 599 (referring application presented to Justice Ginsberg to whole Court). As the Fourth Circuit explained in reversing a materially identical injunction, “every maxim of prudence suggests that” a court “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.” Slip Op. 6, *Casa de Maryland v. Trump*, No. 19-2222 (4th Cir. Aug. 5, 2020).

There is no basis for the district court’s remarkable suggestion that the Supreme Court issued a stay despite remaining agnostic about the merits of the case. *See Conkright*, 556 U.S. at 1402 (stay applicant “must” show “a fair prospect that a majority of the Court will conclude that the decision below is erroneous”). That no Justice wrote an opinion about the merits of the case as opposed to the nationwide scope of the injunction, Op. 10, is immaterial, particularly because the Supreme Court also stayed a materially identical injunction issued by another district court that was limited to the State of Illinois, *see Wolf v. Cook County*, 140 S. Ct. 681. Given the importance of showing a likelihood of success on the merits in obtaining injunctive relief, *see Winter*, 555 U.S. at 20, and because—as even the district court acknowledged—none of the new COVID-19-related allegations alters that likelihood,

the district court acted impermissibly in choosing to issue another injunction in the face of the Supreme Court's stay.

The Supreme Court's statement that its order denying plaintiffs' motion to lift or modify the stay "does not preclude a filing in the District Court as counsel considers appropriate," *New York*, 2020 WL 1969276, at *1, does not constitute an invitation for the district court so readily to nullify the Supreme Court's decision. That statement simply acknowledged that the Supreme Court's order on the motion to lift or modify the stay did not itself foreclose plaintiffs from making future filings in the district court; it in no way suggested that the district court could ignore the necessary implications of the Supreme Court's prior stay order or the pendency of the prior preliminary-injunction appeals in ruling on those filings. In particular, the Supreme Court did not grant plaintiffs' request that "the Court should clarify that its stay does not preclude the district court from considering whether changed circumstances from the COVID-19 outbreak warrant temporary relief from implementation of the Public Charge Rule," Mot. to Lift Stay 27, much less state that the district court should act as if the Supreme Court had never addressed the propriety of a stay in these cases.

2. This Court's recent decision affirming the district court's original preliminary injunctions does not retroactively justify the district court's new preliminary injunction. This Court has now held that plaintiffs have standing to bring these cases, and that the Rule fails at *Chevron* step one and is otherwise arbitrary and

capricious. *See New York*, 2020 WL 4457951, at *25-26. The government respectfully disagrees with those conclusions, for the reasons given in its prior briefing, and preserves its merits arguments on those points for further review. This Court did not reach the equal-protection and Rehabilitation Act claims brought by plaintiffs, which are meritless for the reasons given in the government’s prior briefing.

For present purposes, the relevant point is that this Court acknowledged that “courts of parallel or superior authority”—namely the Supreme Court, the Fourth Circuit, and the Ninth Circuit—have stayed injunctions in these cases and others, necessarily concluding that the government has a good chance of success against challenges to the Rule. *New York*, 2020 WL 4457951, at *32; *see New York*, 140 S. Ct. 599; *Cook County*, 140 S. Ct. 681; *San Francisco*, 944 F.3d at 800; Order, *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019). Indeed, just one day after this Court’s decision, the Fourth Circuit reversed the preliminary injunction in *Casa de Maryland*, thereby creating a square conflict with his Court’s holding. *See* Slip Op., *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir. Aug. 5, 2020). Moreover, even before the Fourth Circuit’s decision, this Court acknowledged that its “conclusion that Congress ratified the settled meaning of ‘public charge’ in 1996 conflicts with decisions from the only two circuits to have addressed this argument to date,” including the Seventh Circuit, which likewise affirmed a preliminary injunction. *New York*, 2020 WL 4457951, at *20. This Court’s decision and that of the Fourth Circuit

deepen the conflict among the courts of appeals, making it all the more likely that the Supreme Court will grant certiorari on these issues.

And as the Supreme Court has already indicated in granting its stay, there is a fair prospect that a majority of the Justices will ultimately conclude that the government will succeed on appeal. The COVID-19 pandemic provides no basis to question that conclusion; as noted, neither plaintiffs nor the district court has suggested that the COVID-19 pandemic has any bearing on the merits of these cases.

The issuance of this Court’s August 4 decision thus does not provide any basis to second-guess the Supreme Court’s stay. To the contrary, this Court recognized that the Supreme Court’s stay of the preliminary injunctions at issue in that appeal persists “through the disposition of DHS’s petition for a writ of certiorari, should DHS seek review” of this Court’s decision. *New York*, 2020 WL 4457951, at *32. To the extent that this Court’s decision in the prior appeal overlaps with the merits of this one, it only underscores the impropriety of the district court’s undermining the Supreme Court’s stay of the prior injunctions before that stay lapses on its own terms.

II. The Remaining Factors Favor A Stay

As the Supreme Court necessarily concluded, both the government and the public will be irreparably harmed by the renewed injunction. *See Conkright*, 556 U.S. at 1402. So long as the Rule is enjoined, DHS will be required to grant lawful-permanent-resident status to aliens whom the Secretary would otherwise deem likely to become public charges in the exercise of his discretion. DHS currently has no

practical means of revisiting public-charge inadmissibility determinations once made, so the injunctions will inevitably result in the grant of lawful-permanent-resident status to aliens who, under the Secretary’s interpretation of the statute, are likely to become public charges. *See Declaration of Daniel Renaud ¶ 4, New York v. U.S. Dep’t of Homeland Sec.*, No. 19-cv-7777, (S.D.N.Y. Oct. 25, 2019), ECF No. 113.

A stay is particularly warranted given that the Rule has been in effect for more than five months. The district court’s preliminary injunction is therefore subject to even higher scrutiny than its original injunctions, because the new injunction “alter[s], rather than maintain[s] the status quo.” *Beal v. Stern*, 184 F.3d 117, 122-23 (2d Cir. 1999). And enjoining a Rule that has already taken effect will only exacerbate the same harms that supposedly justify the injunction—sowing additional confusion about the effect of the Rule and depriving aliens and the government of clarity about which scheme should apply.

The COVID-19 pandemic does not materially alter that calculus, much less change it sufficiently to warrant overriding the Supreme Court’s determination that a stay of the original injunctions was warranted. On March 13, 2020—the same day that President Trump declared that the COVID-19 outbreak constitutes a national emergency—USCIS issued an alert to ensure that the Rule would not deter aliens from seeking medical treatment or preventive services related to COVID-19. *See Op. 25.* The alert categorically states that “treatment or preventive services” for COVID-19 “will not negatively affect any alien as part of a future public charge analysis.” *See*

id. And more generally, the context of the COVID-19 pandemic will be taken into account in the totality of the circumstances. *See id.* at 26.

Moreover, even apart from the guidance, the Rule’s effects on current benefits usage during the COVID-19 crisis remain modest because “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.” *New York*, 2020 WL 4457951, at *6; *see* 8 U.S.C. §§ 1613(a), 1641(b), 1642(a). And while certain lawfully present aliens who are pregnant or under age 21 may be both subject to the public-charge ground of inadmissibility and also eligible for Medicaid, the Rule itself exempts their receipt of Medicaid benefits from public-charge inadmissibility determinations. *See* 84 Fed. Reg. at 41,297.

The district court cited evidence put forward by plaintiffs indicating that aliens have nevertheless “refus[ed] to enroll in Medicaid or other publicly funded health coverage” or forgone “testing and treatment for COVID-19” because they *mistakenly* believe those actions might be held against them in a public charge inadmissibility determination. Op. 23-24. But as the district court acknowledged, those harms stem not from the Rule itself, but from mistaken beliefs about how the Rule will be applied in the COVID-19 context. The “balance of the equities” (Op. 28) does not favor suspending a lawful Rule because some subset of people misunderstands its legal effects.

Given that the harms on which the district court relied stem from aliens' mistaken understanding of the Rule's current and future effects, moreover, it is also highly doubtful that the district court's injunction will actually prevent those harms. After all, if the Rule's legal effect does not cause those harms, then *suspending* the Rule's legal effect—especially through a necessarily temporary preliminary injunction—cannot cure them. The district court pointed to no evidence suggesting otherwise. Nor did the district court offer any reason to conclude that a temporary injunction against the Rule will mitigate those harms more effectively than the agency's own clarification directly addressed to COVID-19 itself. And the plaintiffs have not offered evidence that could support such a conclusion; for example, they have made no showing that the district court's earlier nationwide injunction increased public benefits usage during the period it was in effect between October 2019 and January 2020. Nor do plaintiffs explain how a new preliminary injunction, which could be stayed or overturned at any time on appeal, is likely to encourage aliens who mistakenly believe that seeking testing and treatment for COVID-19 would be used against them will now choose to take advantage of those benefits. The district court therefore erred by concluding that a preliminary injunction barring implementation of the Rule in its entirety is necessary (or even helpful) to remedy the harms plaintiffs identify.

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

At a minimum, the Court should stay the new injunction insofar as it sweeps more broadly than necessary to redress plaintiffs' alleged injuries. In the prior appeal, this Court exercised its discretion, "in light of the divergent decisions that have emerged in our sister circuits since the district court entered its orders, to modify the injunction, limiting it to the states of New York, Connecticut, and Vermont." *New York*, 2020 WL 4457951, at *32. The Court saw "no need for a broader injunction at this point," given that the modified injunction "covers the State plaintiffs and the vast majority of the Organizations' operations," and given that the Supreme Court has already issued a stay. *Id.* Those considerations likewise counsel in favor of a partial stay of the injunction at issue here.

The asserted need for uniformity in immigration enforcement cannot overcome the fundamental principle that an injunction should be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen*, 512 U.S. at 765. Plaintiffs here allege harms stemming from application of the Rule to individuals living within the plaintiff States. As this Court recognized, there is no need for an injunction that extends beyond those plaintiff States in order to remedy those harms. *New York*, 2020 WL 4457951, at *32; *see Trump v. Hawaii*, 138 S. Ct. 2392, 2424-29 (2018) (Thomas, J., concurring).

Moreover, as this Court also recognized, the nationwide scope of the district court's preliminary injunction is particularly problematic given that the Supreme Court

and other Circuits have stayed other preliminary injunctions issued across the country. 2020 WL 4457951, at *32. Two justices emphasized the inappropriateness of nationwide injunctions in the context of these very cases. *New York*, 140 S. Ct. at 599-601 (Gorsuch, J., concurring). The Fourth Circuit not only stayed a preliminary injunction against the Rule, Order, *Casa de Maryland*, No. 19-2222 (4th Cir. Dec. 9, 2019), but then reversed the grant of that injunction because the Rule “clearly” falls within DHS’s authority to define “public charge,” Slip Op. 56, *Casa de Maryland*, No. 19-2222 (4th Cir. Aug. 5, 2019). And the Ninth Circuit has stayed preliminary injunctions against the Rule issued by district courts in its jurisdiction. *San Francisco*, 944 F.3d 773. The district court’s decision here should not be permitted to override those rulings and stays issued by federal courts of appeals and thereby dictate treatment of the Rule for the entire country.

CONCLUSION

The preliminary injunction should be stayed pending the federal government’s appeal. And because the injunction disrupts the status quo and causes ongoing

irreparable harm to the government, the government also requests an administrative stay while the Court considers this motion for stay pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,115 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 7, 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
Jack Starcher

ATTACHMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
STATE OF NEW YORK, CITY OF NEW YORK, :
STATE OF CONNECTICUT, and STATE OF :
VERMONT, :
-----x

Plaintiffs, :
-----x

-against- :
-----x

UNITED STATES DEPARTMENT OF HOMELAND :
SECURITY; KEVIN K. MCALEENAN, *in his official* :
capacity as Acting Secretary of the United States :
Department of Homeland Security; UNITED STATES :
CITIZENSHIP AND IMMIGRATION SERVICES; :
KENNETH T. CUCCINELLI II, *in his official capacity* :
as Acting Director of United States Citizenship and :
Immigration Services; and UNITED STATES OF :
AMERICA., :
-----x

Defendants. :
-----x

MEMORANDUM DECISION
AND ORDER

19 Civ. 7777 (GBD)

-----x
MAKE THE ROAD NEW YORK, AFRICAN :
SERVICES COMMITTEE, ASIAN AMERICAN :
FEDERATION, CATHOLIC CHARITIES :
COMMUNITY SERVICES (ARCHDIOCESE OF NEW :
YORK), and CATHOLIC LEGAL IMMIGRATION :
NETWORK, INC., :
-----x

Plaintiffs, :
-----x

-against- :
-----x

KEN CUCCINELLI, *in his official capacity as Acting* :
Director of United States Citizenship and Immigration :
Services; UNITED STATES CITIZENSHIP & :
IMMIGRATION SERVICES; KEVIN K. :
MCALEENAN, *in his official capacity as Acting* :
Secretary of Homeland Security; and UNITED STATES :
DEPARTMENT OF HOMELAND SECURITY, :
-----x

Defendants. :
-----x

MEMORANDUM DECISION
AND ORDER

19 Civ. 7993 (GBD)

GEORGE B. DANIELS, United States District Judge:

Before this Court is a now-consolidated action, (*see* Endorsed Letter, No. 19 Civ. 7777, ECF No. 142; Endorsed Letter, No. 19 Civ. 7993, ECF No. 178), in which Plaintiffs challenge Defendants' promulgation, implementation, and enforcement of a rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (the "Rule"). The Rule redefines the term "public charge" and establishes new criteria for determining whether a noncitizen seeking entry into the United States or adjustment of status is ineligible because he or she is likely to become a "public charge."

In one action, the State of New York, the City of New York, the State of Connecticut, and the State of Vermont (together, the "Governmental Plaintiffs") filed suit against Defendants United States Department of Homeland Security ("DHS"); United States Citizenship and Immigration Services ("USCIS"); Secretary Kevin K. McAleenan, in his official capacity as Acting Secretary of DHS; Director Kenneth T. Cuccinelli II, in his official capacity as Acting Director of USCIS; and the United States of America. (Compl. for Declaratory and Injunctive Relief ("Gov't Pls. Compl."), No. 19 Civ. 7777, ECF No. 17.) In a separate case, Plaintiffs Make the Road New York, African Services Committee, Asian American Federation, Catholic Charities Community Services (Archdiocese of New York), and Catholic Legal Immigration Network, Inc. (together, the "Organizational Plaintiffs") brought claims against Defendants Ken Cuccinelli, in his official capacity as Acting Director of USCIS; Kevin K. McAleenan, in his official capacity as Acting Secretary of DHS; USCIS; and DHS. (Compl. ("Org. Pls. Compl."), No. 19 Civ. 7993, ECF No. 1.)

On October 11, 2019, this Court issued a preliminary injunction in both actions preventing implementation of the Rule. (Mem. Decision and Order ("Gov't Pls. Decision"), No. 19 Civ. 7777,

ECF No. 110 (reported at 408 F. Supp. 3d 334 (S.D.N.Y. 2019)); Mem. Decision and Order (“Org. Pls. Decision”), No. 19 Civ. 7993, ECF No. 147 (reported at 419 F. Supp. 3d 647 (S.D.N.Y. 2019)).) Specifically, this Court issued a nationwide injunction, as well as a stay postponing the effective date of the Rule, pending adjudication on the merits or further order of the Court (the “October 2019 Injunction”). (Gov’t Pls. Decision at 24; Org. Pls. Decision at 26.) Between October 11 and October 14, four other district courts issued similar injunctions, two of which were also nationwide in scope. *Cook Cty., Illinois v. McAleenan*, 417 F. Supp. 3d 1008, 1014 (N.D. Ill. 2019) (injunction as to Illinois); *Casa de Md., Inc. v. Trump*, 414 F. Supp. 3d 760, 767 (D. Md. 2019) (nationwide); *City & Cty. of San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1073 (N.D. Cal. 2019) (injunction as to San Francisco City or County, Santa Clara County, California, Oregon, the District of Columbia, Maine, and Pennsylvania); *Washington v. U.S. Dep’t of Homeland Sec.*, 408 F. Supp. 3d 1191, 1199 (E.D. Wash. 2019) (nationwide).

Defendants appealed to the Second Circuit, seeking to vacate this Court’s orders. Defendants’ also moved before this Court to stay the October 2019 Injunction, pending resolution of Defendants’ appeal. That application was denied by this Court. (See Mem. Decision and Order, No. 19 Civ. 7777, ECF No. 122; Mem. Decision and Order, No. 19 Civ. 7993, ECF No. 159.) Defendants then moved for a stay before the Second Circuit. The Circuit court also denied Defendants’ stay request, instead setting an expedited briefing schedule on the merits of their appeal. *New York v. U.S. Dep’t of Homeland Sec.*, Nos. 19-3591, 19-3595, 2020 WL 95815, at *1 (2d Cir. Jan. 8, 2020). Defendants next sought emergency relief from the Supreme Court. On January 27, 2020, the Supreme Court granted Defendants’ request and stayed this Court’s preliminary injunctions, pending disposition of Defendants’ appeal in the Second Circuit and further petition for a writ of certiorari, if timely sought. *Dep’t of Homeland Sec. v. New York*, 140

S. Ct. 599 (2020) (mem.). Following the Supreme Court’s stay, the Rule went into effect on February 24, 2020.¹

Much has significantly changed since January 27. Today, the world is in the throes of a devastating pandemic, triggered by the novel coronavirus SARS-CoV-2. In six months, approximately 16.5 million people around the globe have been afflicted by the disease caused by this virus. That disease (COVID-19) has claimed over 650,000 lives worldwide. In the United States alone, COVID-19 has spread rapidly, infecting over four million people. Close to 150,000 American residents have died. All of these staggering numbers continue to climb on a daily basis.

The Secretary of Health and Human Services declared a public health emergency in response to the virus on January 31, 2020. As of March 12, 1,645 people from 47 states had been infected. On March 13, the President declared a state of national emergency, beginning March 1, 2020, which is ongoing. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020). Thousands continue to die indiscriminately. Attempting to effectively combat this plague has immediately come in conflict with the federal government’s new “public charge” policy, a policy which is intended to discourage immigrants from utilizing government benefits and penalizes them for receipt of financial and medical assistance. In an effort to ensure that the Rule will not deter immigrants from seeking necessary medical treatment and preventive services related to COVID-19, the federal government issued an “alert,” contemporaneous with the President’s declaration of a national emergency, that excludes COVID-19 medical treatment and services from public charge determinations. *Public Charge Alert*, U.S. Citizenship & Immigr. Servs.,

¹ The relevant factual background regarding the Rule and the framework for public charge determinations prior to the Rule is set forth in greater detail in this Court’s October 11, 2019 decisions. (Gov’t Pls. Decision at 2–5; Org. Pls. Decision at 2–5.) Such background is incorporated by reference herein.

<https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge> (last updated March 27, 2020) (the “Alert”).

Defendants and Plaintiffs have each filed additional motions in the instant actions. Defendants move to dismiss all of Plaintiffs’ claims for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (See Mot. to Dismiss, No. 19 Civ. 7777, ECF No. 140; Mot. to Dismiss, No. 19 Civ. 7993, ECF No. 176.) Plaintiffs, on the other hand, seek additional preliminary injunctive relief in light of the COVID-19 pandemic. Specifically, Plaintiffs move, pursuant to Federal Rule of Civil Procedure 65, for a new limited preliminary injunction enjoining Defendants from implementing, applying, or taking any action under the Rule, during the national emergency. (See Pls.’ Notice of Mot., No. 19 Civ. 7777, ECF No. 168.) Alternatively, Plaintiffs seek, pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 705, a stay postponing the effective date of the Rule during the national emergency. (*Id.*) Plaintiffs also request that this Court issue an indicative ruling under Federal Rule of Civil Procedure 62.1, stating that this Court would issue the new preliminary injunction, and factual findings supporting that injunction, if the Second Circuit determines that this Court currently lacks jurisdiction and remands the case for that purpose.² (*Id.*) Plaintiffs’ motion for a preliminary injunction enjoining the application of the

² Federal Rule of Civil Procedure 62.1 details a court’s options for addressing a motion when a pending appeal divests the court of jurisdiction to grant such motion. In particular, under Rule 62.1, a court may (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue. Fed. R. Civ. P. 62.1(a).

Rule during the national public health emergency, and issuance of an indicative ruling, is GRANTED.³

Defendants' motion to dismiss is GRANTED to the extent that Count III of Organizational Plaintiffs' complaint, claiming that DHS and USCIS lacked authority to promulgate the Rule, is dismissed.

I. DEFENDANTS' MOTIONS TO DISMISS

A. Rule 12(b)(1) Lack of Subject Matter Jurisdiction.

Defendants contend that Plaintiffs cannot meet the jurisdictional requirements of standing and ripeness. The proper procedural route for such a challenge is a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). *See All. for Env'tl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 n.6 (2d Cir. 2006) ("[T]he proper procedural route [for a standing challenge] is a motion under Rule 12(b)(1)."); *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 261 F. Supp. 2d 293, 294 (S.D.N.Y. 2003) ("Ripeness is jurisdictional in nature and therefore properly considered on a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules.").

Defendants raise several arguments that Plaintiffs' claims are not justiciable. This Court has heard these arguments before and need not revisit in great detail its analysis of whether Plaintiffs have standing or whether their claims are ripe for judicial review. (See Gov't Pls. Decision at 6–9; Org. Pls. Decision at 6–11.) First, as this Court previously found, Plaintiffs sufficiently allege "concrete and particularized" injuries stemming from Defendants' promulgation of the Rule. Organizational Plaintiffs establish that they have already diverted

³ Today, this Court also grants a preliminary injunction enjoining Department of State and Department of Health and Human Services actions relevant to public charge determinations in a related action, *Make the Road New York v. Pompeo*, 19 Civ. 11633 (GBD).

substantial resources to mitigate the Rule's harmful effects and will continue to do so. Governmental Plaintiffs adequately demonstrate that the Rule will continue to have a chilling effect on enrollment in benefits programs that directly reduces Governmental Plaintiffs' revenue, shifts certain healthcare costs to Governmental Plaintiffs who offer subsidized healthcare services, and causes economic harm in the form of lost jobs and tax revenue. Second, Plaintiffs' claims are ripe for review because the legal questions presented do not depend on any factual contingencies. Plaintiffs bring facial challenges to the Rule, which is already in effect. And as Plaintiffs have demonstrated, they will suffer significant harm by further delay. Defendants' motions to dismiss for lack of subject matter jurisdiction are denied.

B. Rule 12(b)(6) Failure to State a Claim.

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must demonstrate “more than a sheer possibility that a defendant has acted unlawfully”; stating a facially plausible claim requires the plaintiff to plead facts that enable the court “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citation omitted). The factual allegations pled must therefore “be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (citation omitted).⁴

A district court must first review a plaintiff's complaint to identify allegations that, “because they are no more than conclusions, are not entitled to the assumption of truth.” *Iqbal*,

⁴ “In deciding a motion to dismiss under Rule 12(b)(6), the court may refer ‘to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.’” *Fishbein v. Miranda*, 670 F. Supp. 2d 264, 271 (S.D.N.Y. 2009) (quoting *Brass v. Am. Film Tech., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993)).

556 U.S. at 679. The court then considers whether the plaintiff's remaining well-pleaded factual allegations, assumed to be true, "plausibly give rise to an entitlement to relief." *Id.*; *see also Targum v. Citrin Cooperman & Co., LLP*, No. 12 Civ. 6909 (SAS), 2013 WL 6087400, at *3 (S.D.N.Y. Nov. 19, 2013). In deciding the 12(b)(6) motion, the court must also draw all reasonable inferences in the non-moving party's favor. *See N.J. Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC*, 709 F.3d 109, 119–20 (2d Cir. 2013).

This Court previously found that Plaintiffs are likely to succeed on their claims under the APA that promulgation of the Rule was contrary to the Immigration and Nationality Act ("INA") and arbitrary and capricious.⁵ Such claims also meet the lower threshold of surviving a motion to dismiss.⁶ *See Fashion Television Assocs., L.P. v. Spiegel, Inc.*, 849 F. Supp. 19, 22 n.7 (S.D.N.Y. 1994) ("[T]he standard in deciding a motion for a preliminary injunction is more stringent than that used in a motion to dismiss") . Defendants, however, argue that this Court should reconsider its analysis of the merits of Plaintiffs' claims.

This Court specifically concluded that Plaintiffs are likely to prevail on their claim that Defendants lacked the authority to redefine "public charge" as they have in the Rule, contrary to the INA and in violation of the APA. (*See* Gov't Pls. Decision at 11–14; Org. Pls. Decision at 13–15.) The longstanding definition of "public charge" is someone who is primarily dependent on the

⁵ These claims are reflected in Counts I and III of the Governmental Plaintiffs' complaint and Counts I and II of the Organizational Plaintiffs' complaint.

⁶ Defendants also argue that these claims, along with the rest of Plaintiffs' claims, fail because Plaintiffs fall outside the zone of interests regulated by the Rule. However, as this Court already concluded, Plaintiffs plainly satisfy the lenient zone-of-interests test. (*See* Gov't Pls. Decision at 10–11; Org. Pls. Decision at 11–12.) Plaintiffs' interests are not "so marginally related to or inconsistent with the purposes implicit in the [INA] that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Bet-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (citation omitted). Governmental Plaintiffs are administrators of public benefits programs targeted by the Rule and Organizational Plaintiffs' very mission is to assist, advise, and advocate for immigrants, including in immigration proceedings. Moreover, all plaintiffs allege economic injury as a result of the Rule.

government for subsistence. (See Gov’t Pls. Decision at 11–13; Org. Pls. Decision at 13–14.) Further, it is undisputed that the term has never been construed as receipt of 12 months of benefits within a 36-month period. (See Gov’t Pls. Decision at 13; Org. Pls. Decision at 14.) Rather, prior to the implementation of the Rule, public charge determinations were an inquiry about self-subsistence, not about lawful receipt of benefits that are in many cases temporary and supplemental. Moreover, there is no evidence that Congress ever intended for a redefinition of the term as set forth in the Rule, including the consideration of non-cash assistance. (See Gov’t Pls. Decision at 13–14; Org. Pls. Decision at 15.) In fact, Congress repeatedly rejected attempts to implement such a framework, (see Gov’t Pls. Compl. ¶¶ 37–42; Org. Pls. Compl. ¶¶ 80–85)—a fact that strongly favors finding that Defendants acted in excess of statutory authority, *see Hamdan v. Rumsfeld*, 548 U.S. 557, 579–80 (2006) (“Congress’ rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government’s interpretation.”). Simply put, Defendants’ definition is outside the bounds of the statute, considering the inherent meaning of the words “public charge” and its historical context. And because Defendants fail to provide any reasonable justification for this change in the definition of “public charge,” or the framework for determining whether an individual is likely to become a public charge, the Rule is also arbitrary and capricious. (See Gov’t Pls. Decision at 14–17; Org. Pls. Decision at 15–19.)

Defendants claim that the Supreme Court’s order staying the October 2019 Injunction and the Ninth Circuit’s decision to stay preliminary injunctions issued by judges in the Eastern District of Washington and the Northern District of California, *City & Cty. of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019), provide reason to revisit this Court’s analysis and dismiss Plaintiffs’ complaints, (Mem. of Law in Supp. of Defs.’ Mot. to Dismiss (“Gov’t MTD Mem.”), No. 19 Civ.

7777, ECF No. 141, at 1; Mem. of Law in Supp. of Defs.’ Mot. to Dismiss (“Org. MTD Mem.”), No. 19 Civ. 7993, ECF No. 177, at 1). To the contrary, the Supreme Court did not address the merits of the claim that the Rule is unlawful. *See Wolf v. Cook Cty., Illinois*, 140 S. Ct. 681, 682 (2020) (Sotomayor, J., dissenting) (noting that in issuing a stay of the October 2019 Injunction, “[n]o Member of the [Supreme] Court discussed the application’s merit apart from its challenges to the injunction’s nationwide scope.”). Further, the Ninth Circuit’s analysis stands in contrast to the Seventh Circuit’s recent decision to affirm the preliminary injunction issued in the Northern District of Illinois.⁷ *See Cook Cty., Illinois v. Wolf*, 962 F.3d 208 (7th Cir. 2020). Here, Defendants’ appeal of this Court’s prior order issuing the October 2019 Injunction is currently pending before the Second Circuit. As such, this Court’s determination regarding the propriety of a preliminary injunction remains undisturbed.

1. Governmental Plaintiffs State a Claim that the Rule is Contrary to the Rehabilitation Act.

Governmental Plaintiffs allege in Count II of their complaint that the Rule is “not in accordance with law” in violation of the APA, because it conflicts with (1) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“Rehabilitation Act”), (2) the Supplemental Nutrition Assistance Program (“SNAP”) statute, 7 U.S.C. § 2017(b), and (3) the Welfare Reform Act, 8 U.S.C. § 1612(b)(1). (Gov’t Pls. Compl. ¶¶ 272–78.) This Court already concluded that

⁷ The Ninth Circuit determined that “Congress has not spoken directly to the interpretation of ‘public charge’ in the INA” and did not “unambiguously foreclose the interpretation articulated in the [Rule].” *City & Cty. of San Francisco v. USCIS*, 944 F.3d at 798. The panel concluded, *inter alia*, that “the phrase ‘public charge’ is ambiguous” and “DHS’s interpretation of ‘public charge’ is a permissible construction of the INA,” including its decision to consider non-cash benefits for the first time. *Id.* at 798–99. In contrast, the Seventh Circuit found that DHS’s interpretation “falls outside the boundaries set by the statute,” because, *inter alia*, “it does violence to the English language and the statutory context to say that [the term ‘public charge’] covers a person who receives only *de minimis* benefits for a *de minimis* period of time” and the “term requires a degree of dependence that goes beyond temporary receipt of supplemental in-kind benefits from any type of public agency.” *Cook Cty., Illinois v. Wolf*, 962 F.3d at 229.

Plaintiffs raise “at least a colorable argument that the Rule as to be applied may violate” Section 504 of the Rehabilitation Act, (*see* Gov’t Pls. Decision at 18; Org. Pls. Decision at 19–20), which prohibits government discrimination against a person with a disability “solely by reason of her or his disability,” 29 U.S.C. § 794(a). “Exclusion or discrimination [under Section 504] may take the form of disparate treatment, disparate impact, or failure to make a reasonable accommodation.” *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016). Defendants do not dispute that a disability is considered a negative factor under the public charge framework. Indeed, the Rule indicates that DHS will consider whether “the alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien’s ability to provide and care for himself or herself, to attend school, or to work.” 84 Fed. Reg. 41,502. Defendants, however, justify this treatment by pointing to the fact that the INA lists “health” as a factor for consideration in public charge determinations. (Gov’t MTD Mem. at 28–29; Org. MTD Mem. at 30–31.) While the INA directs officials to consider an individual’s health, it does not provide license to penalize an applicant solely because of a disability. Defendants apparently make no distinction between a disabled individual who is not self-sufficient and one who is able to cope with his or her disability, even if it requires extensive medical treatment or accommodation. The Rule treats disabilities as a *per se* negative health factor, in apparent violation of the Rehabilitation Act.⁸ Governmental Plaintiffs therefore adequately state a claim that the Rule is “not in accordance with law.”

⁸ The Seventh Circuit recently found, for similar reasons, that “the Rule penalizes disabled persons in contravention of the Rehabilitation Act.” *Cook Cty., Illinois v. Wolf*, 962 F.3d at 228. The Seventh Circuit concluded the Rule “disproportionately burdens disabled people and in many instances makes it all but inevitable that a person’s disability will be the but-for cause of her being deemed likely to become a public charge.” *Id.*

2. *Governmental Plaintiffs State a Claim that the Rule Violates Procedural Requirements of the APA*

In Count IV of their complaint, Governmental Plaintiffs claim that Defendants failed to meet the procedural requirements of the APA in promulgating the Rule. (Gov't Pls. Compl. ¶ 290–95.) Specifically, Governmental Plaintiffs allege that Defendants did not “give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments,” 5 U.S.C. § 553(c). They argue that the Rule’s definition of “public charge” was not a logical outgrowth of DHS’s notice of proposed rulemaking, *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114 (Oct. 10, 2018) (“NPRM”), in two respects. First, Governmental Plaintiffs point to the fact that the NPRM included a value threshold (i.e., 15% of the Federal Poverty Guidelines) for counting public benefits as relevant to the public charge determination. That value threshold was eliminated in the Rule in favor of a purely durational standard. (Gov’t Pls. Compl. ¶ 124.) Second, Governmental Plaintiffs argue that DHS did not provide public notice of the so-called “stacking scheme” for counting multiple benefits received in a given month when calculating the 12/36-month durational threshold (i.e., each benefit received in a month counts as one month of benefits towards the threshold). (*Id.* ¶ 125.) Governmental Plaintiffs claim that these policies were neither discussed in, nor a logical outgrowth of, the NPRM. “A final rule qualifies as a logical outgrowth ‘if interested parties “should have anticipated” that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.’” *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079–80 (D.C. Cir. 2009) (citations omitted). Here, both the value threshold and the stacking scheme on the 12/36-month standard were discussed in the NPRM, but the former was limited to monetizable benefits (e.g., cash benefits and SNAP) and the latter was proposed for non-monetizable benefits (e.g., Medicaid). 83 Fed. Reg. 51,163–66, 51,289–90. Ultimately, DHS decided to apply the

12/36-month standard, including the stacking scheme, to all benefits, whether monetizable or not. Governmental Plaintiffs had an opportunity to comment on the stacking structure, but this Court cannot conclude that they should have anticipated DHS eliminating the value threshold and replacing it with an entirely durational threshold for all benefits. DHS only proposed the 12/36-month durational threshold because it lacked “an easily administrable standard for assessing the monetary value of an alien’s receipt of some non-cash benefits.” *Id.* at 51,165. DHS even sought comments on “other potential approaches to monetizing these benefits.” *Id.* at 51,166. If anything, Governmental Plaintiffs could have anticipated a valuation-based standard for all benefits in the final rule. They could not have reasonably expected DHS to do away with the valuation-based threshold entirely. Accordingly, Governmental Plaintiffs sufficiently allege that the Rule violates procedural requirements of the APA.

3. Plaintiffs State a Claim that the Rule Violates the Equal Protection Guarantee of the Fifth Amendment.

In Count IV of their complaint, Organizational Plaintiffs claim that the Rule violates the equal protection guarantee of the Fifth Amendment. This Court previously determined that Organizational Plaintiffs have “at the very least, raised serious questions going to the merits of their Equal Protection Claim.” (Org. Pls. Decision at 21 (quoting *Saget v. Trump*, 375 F. Supp. 3d 280, 374 (E.D.N.Y. 2019).) In particular, this Court concluded that the Rule likely fails to satisfy even the highly deferential standard of rational basis scrutiny, because it disproportionately harms noncitizens of color, and Defendants have not articulated a “rational relationship between the disparity of treatment and some legitimate government purpose.” *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Governmental Plaintiffs bring similar claims under Count V of their complaint, which likewise survive Defendants’ motion to dismiss. Plaintiffs also sufficiently plead animus required for an equal

protection claim under the legal standard set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). In addition to their allegations that the Rule will disparately impact immigrants of color, (Gov’t Pls. Compl. ¶¶ 151–56, 258–62; Org. Pls. Compl. ¶¶ 235–37), which Defendants do not dispute, Plaintiffs provide extensive evidence of statements that may evince discriminatory intent made by high-level officials who were allegedly the decision-makers behind the Rule or influenced such decision-makers, (Gov’t Pls. Compl. ¶¶ 174–78; Org. Pls. Compl. ¶¶ 203–34). Plaintiffs include, *inter alia*, statements by the President allegedly expressing “dismay that [the United States] do[es] not ‘have more people from places like Norway,’ contrasting such immigrants with those from ‘[expletive deleted] countries’ such as Haiti and countries in Africa.” (Org. Pls. Compl. ¶ 211; *see also* Gov’t Pls. Compl. ¶ 175.)

The Supreme Court recently rejected an equal protection challenge to the decision to rescind the Deferred Action for Childhood Arrivals (DACA) program that was based, in part, on disparate impact on Latinos and alleged discriminatory statements by the President. *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1915–16 (2020). Defendants argue that the plurality opinion in *Regents* strongly supports dismissal of Plaintiffs’ equal protection claims in this case. (Defs.’ Letter dated June 26, 2020, No. 19 Civ. 7777, ECF No. 193; Defs.’ Letter dated June 26, 2020, No. 19 Civ. 7993, ECF No. 219.) Defendants point to two aspects of the plurality opinion, in particular. First, the plurality discounted the disparate impact of the rescission of DACA because “Latinos make up a large share of the unauthorized alien population,” and so “one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program.” *Regents*, 140 S. Ct. at 1915. The Court explained that “[w]ere this fact sufficient to state a[n] [equal protection] claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds.” *Id.* at 1916. But here,

Plaintiffs are not simply alleging that more immigrants of color are hurt by the agency action at issue. Instead, Plaintiffs cite evidence regarding 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. (See, e.g., Gov’t Pls. Compl. ¶¶ 151, 262; Org. Pls. Compl. ¶¶ 235–36.) This finding is unaffected by the share of the immigrant population that is nonwhite.

Second, the *Regents* plurality dismissed the President’s statements as “unilluminating” because they were “remote in time and made in unrelated contexts.” *Id.* at 1916. Here, the President’s statements cited by Plaintiffs were not “remote in time” to Defendants’ promulgation of the Rule and actions by the President that allegedly precipitated promulgation of the Rule. (See, e.g., Gov’t Pls. Compl. ¶ 175; Org. Pls. Compl. ¶¶ 93–94, 203–11.) For instance, Plaintiffs cite statements from January 2018, May 2018, and July 2019. (Gov’t Pls. Compl. ¶ 175; Org. Pls. Compl. ¶¶ 208–209, 211.) The Rule’s development fits squarely within this timeframe. Drafts of the Rule were obtained by the news outlets in February and March 2018, (Org. Pls. Compl. ¶ 94), the NPRM was published in October 2018, and the Rule was issued in August 2019. Plaintiffs’ allegations also extend beyond the President’s statements to include statements by high-level officials that are responsible for the Rule. Indeed, Defendant Cuccinelli, a day after announcing the Rule, stated that the Emma Lazarus poem etched on the base of the Statue of Liberty welcoming “tired,” “poor,” and “huddled masses” of immigrants was referring to “people coming from Europe.” (Gov’t Pls. Compl. ¶ 176; Org. Pls. Compl. ¶ 227.) Drawing reasonable inferences in Plaintiffs’ favor, Plaintiffs have plausibly alleged that issuance of the Rule was based, at least in part, on discriminatory motives and their claims survive Defendants’ motions to dismiss.

4. *Organizational Plaintiffs Fail to State a Claim that DHS and USCIS Lack Rulemaking Authority to Issue the Rule.*

Organizational Plaintiffs allege in Count III of their complaint that DHS and USCIS lack rulemaking authority to issue the Rule. (See Org. Pls. Compl. ¶¶ 179–83, 285–91.) Section 103 of the INA, as amended by the Homeland Security Act of 2002 (“HSA”), sets forth the powers and duties of the Secretary of Homeland Security (the “Secretary”) as it relates to the immigration laws. *See* 8 U.S.C. § 1103. Specifically, the Secretary is “charged with administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the . . . Attorney General.” *Id.* § 1103(a)(1). The Secretary is authorized to “establish such regulations . . . as he deems necessary for carrying out his authority.” *Id.* § 1103(a)(3). Additionally, under the HSA, Congress specifically conferred on DHS the authority to “carry[] out the immigration enforcement functions,” 6 U.S.C. §§ 202(3), and “establish[] and administer[] rules . . . governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States,” *id.* § 202(4).

The public charge provision states that the Attorney General is responsible for public charge determinations for those seeking admission or adjustment of status, *see* 8 U.S.C. § 1182(a)(4)(A), which Organizational Plaintiffs argue divests the Secretary of responsibility for making such determinations, pursuant to 8 U.S.C. § 1103(a)(1), and therefore also any associated rulemaking authority. However, as Defendants note, under the HSA, Congress also made clear that such references to the Attorney General should be construed as references to the Secretary. *See* 6 U.S.C. § 557 (“With respect to any function transferred by or under this chapter, . . . reference in any other Federal law to . . . any officer or office the functions of which

are so transferred shall be deemed to refer to the Secretary, other official, or component of [DHS] to which such function is so transferred.”). The Secretary is thus at least concurrently responsible for administering public charge determinations and any associated rulemaking.⁹ *Cf. Scheerer v. U.S. Atty. Gen.*, 513 F.3d 1244, 1251 & n.6 (11th Cir. 2008). Count III of Organizational Plaintiffs’ complaint is dismissed.

⁹ To be sure, there must be some set of powers, functions and duties conferred on the Attorney General that are excluded from the purview of DHS and the Secretary for the plain language of 8 U.S.C. § 1103(a)(1), as amended by the HSA, to carry meaning. As Defendants aptly point out, we find a likely set of such duties elsewhere in Section 1103. Under clause (g)(1), also added as part of the HSA, the Attorney General explicitly retains the authorities and functions exercised by the Executive Office for Immigration Review. 8 U.S.C. § 1103(g)(1).

II. PLAINTIFFS' MOTION FOR A NEW TEMPORARY INJUNCTION

“[A] preliminary injunction is ‘an extraordinary remedy never awarded as of right.’” *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (per curiam) (citation omitted). To obtain a preliminary injunction, the moving party must establish “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The standard for a stay of agency action under 5 U.S.C. § 705 is the same as the standard for a preliminary injunction. *Nat. Res. Def. Council v. U.S. Dep’t of Energy*, 362 F. Supp. 3d 126, 149 (S.D.N.Y. 2019).

Plaintiffs now seek a limited preliminary injunction temporarily halting implementation of the Rule in light of new circumstances not previously considered by the Court—namely, the COVID-19 outbreak and the attendant consequences of Defendants implementing the Rule in the midst of a public health crisis. Plaintiffs bring their motion in this Court after first seeking relief from the Supreme Court to lift its stay of this Court’s October 2019 Injunction. On April 13, 2020, the Governmental Plaintiffs filed a motion in the Supreme Court to temporarily lift or modify the Supreme Court’s stay for the duration of the national emergency. Mot. by Gov’t Pls. to Temporarily Lift or Modify the Court’s Stay of the Orders Issued by the U.S. Dist. Ct. for S.D.N.Y. (“Gov’t Pls. SCOTUS Mot.”) at 1, *Dep’t of Homeland Sec. v. New York*, 2020 WL 1969276 (U.S. Apr. 24, 2020) (No. 19A785); (*see also* Mem. of Law in Supp. of Pls.’ Mot. for Prelim. Inj. and Stay or TRO Pending National Emergency (“Emergency PI Mem.”), No. 19 Civ. 7777, ECF No. 169, at 2.) Alternatively, Governmental Plaintiffs asked the Supreme Court to clarify that the stay “does not preclude the district court here from considering whether the new circumstances caused by the novel coronavirus warrant temporarily halting implementation of the Rule.” Gov’t Pls.

SCOTUS Mot. at 1–2. In a two-line order, the Supreme Court denied the request to modify or lift the stay, but indicated that the order “does not preclude a filing in the District Court as counsel considers appropriate.” *Dep’t of Homeland Sec. v. New York*, No. 19A785, 2020 WL 1969276, at *1 (U.S. Apr. 24, 2020) (mem.). Consistent with that order, Plaintiffs then filed the instant motion in this Court.

A. This Court Has Jurisdiction to Issue A New Temporary Injunction.

Defendants challenge whether this Court retains jurisdiction to issue a limited preliminary injunction. Specifically, they argue this Court lacks authority to provide such preliminary relief because (1) Defendants’ interlocutory appeal seeking to vacate the October 2019 Injunction is still pending before the Second Circuit and (2) a new preliminary injunction would effectively overrule the Supreme Court’s stay of the October 2019 Injunction. (See Opp’n to Pls.’ Mot. for Prelim. Inj. and Stay or TRO Pending Nat’l Emergency (“Emergency PI Opp’n”), No. 19 Civ. 7777, ECF No. 176, at 6–10.)

“As a general rule, an appeal may be taken only from a final judgment.” *N.Y. State Nat. Org. for Women v. Terry*, 886 F.2d 1339, 1349 (2d Cir. 1989). As an exception to this rule, “Congress permits . . . an immediate appeal from an interlocutory order that either grants or denies a preliminary injunction.” *Id.* at 1350. Such an appeal, however, does not prevent the matter from otherwise proceeding in the district court. *See id.* at 1350. “[A] notice of appeal only divests the district court of jurisdiction respecting the questions raised and decided in the order that is on appeal.” *Id.* at 1350 (citations omitted); *see also Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (“The filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”) (citations omitted). Moreover, the “divestiture of jurisdiction rule is . . . not a per se rule.” *United*

States v. Rodgers, 101 F.3d 247, 251 (2d Cir. 1996). The rule is judicially crafted and is “rooted in the interest of judicial economy.” *Id.* Therefore, “its application is guided by concerns of efficiency and is not automatic.” *Id.* (citing *Webb v. GAF Corp.*, 78 F.3d 53, 55 (2d Cir. 1996) and *United States v. Salerno*, 868 F.2d 524, 539–40 (2d Cir. 1989)).

Here, Plaintiffs seek “new relief based upon new facts and circumstances that were not—and could not have been—before the Court when it issued its prior order.” (Emergency PI Mem. at 14.) In deciding Defendants’ pending appeal, the Second Circuit is charged with reviewing this Court’s analysis and conclusions based on the information available to this Court at the time of its original decision. Therefore, by considering new, materially different evidence and issuing a new, narrowly tailored, temporary injunction, this Court does not disturb its prior orders or interfere with the particular questions presented by Defendants’ pending appeal.

Overlapping legal issues between this Court’s previous order and Plaintiffs’ instant motion do not automatically divest this Court of jurisdiction. A district court may advance a case despite a pending interlocutory appeal and, in doing so, is often required to rule on issues relevant to those on appeal. The Second Circuit has held that a district court retains jurisdiction to issue a permanent injunction despite a pending appeal from an order granting a preliminary injunction. *Webb*, 78 F.3d at 55; *cf. Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. E. Air Lines, Inc.*, 847 F.2d 1014, 1019 (2d Cir. 1988) (affirming issuance of an injunction by the district court based on new evidence while the district court’s previous denial of an injunction was pending appeal). Indeed, Defendants ask this Court to revisit its prior legal analysis in deciding their instant motion to dismiss. Moreover, the judicial efficiency concerns that guide the divestiture of jurisdiction rule counsel against depriving this Court of authority to hear Plaintiffs’ motion. As Plaintiffs correctly note, this Court, as a district court, is best suited to make factual findings and issue concordant,

narrowly tailored relief. (Reply Mem. of Law in Supp. of Pls.’ Mot. for Prelim. Inj. and Stay or TRO Pending Nat’l Emergency (“Emergency PI Reply”), No. 19 Civ. 7777, ECF No. 183, at 2.)

By issuing such relief, this Court would also not be ignoring the Supreme Court’s stay of the October 2019 Injunction. First, as discussed above, there is no indication that the Supreme Court disagreed with this Court’s analysis of the merits of Plaintiffs’ case. Second, the Supreme Court issued its stay on a significantly different factual record. In issuing a stay of a lower court’s “exercise of equitable discretion [in granting a preliminary injunction], [the Supreme Court] bring[s] to bear an equitable judgment of [its] own.” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (citing *Nken v. Holder*, 556 U.S. 418, 433 (2009)). Specifically, before issuing a stay, the Supreme Court “balance[s] the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.” *Id.* (quoting *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers)). Here, the Supreme Court provided no analysis for its decision to stay the October 2019 Injunction, nor any insight into its equitable judgment. What is clear, however, is that the irreparable harm and public interests that warrant an injunction have come into sharper focus in the intervening months since the Supreme Court issued its stay. What were previously theoretical harms have proven to be true. We no longer need to imagine the worst-case scenario; we are experiencing its dramatic effects in very real time. Equitable relief has become nothing short of critical. In issuing temporary relief today, this Court certainly is mindful of the Supreme Court’s stay of the previously issued injunctions, but exercises equitable discretion based on the record now before it—one the Supreme Court never had the opportunity to consider when it stayed the pending October 2019 Injunction.¹⁰

¹⁰ Though the Supreme Court denied Governmental Plaintiffs’ recent motion to temporarily lift or modify the Supreme Court’s stay of the October 2019 Injunction, the Justices did not indicate whether they

B. The COVID-19 Pandemic Warrants Temporary Equitable Relief

As an initial matter, this Court has already found that Plaintiffs are likely to succeed on the merits of their claims. As to the remaining factors to be considered for preliminary injunctive relief, Plaintiffs argue that the “pandemic has drastically altered the nature and magnitude of the irreparable harms faced by Plaintiffs, their residents, and the nation due to the Rule and tipped the balance of the equities decisively in favor of granting injunctive relief while the COVID-19 emergency continues.” (Emergency PI Mem. at 16.)

“A showing of irreparable harm is ‘the single most important prerequisite for the issuance of a preliminary injunction.’” *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (citation omitted). “To satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction they will suffer ‘an injury that is neither remote nor speculative, but actual and imminent,’ and one that cannot be remedied ‘if a court waits until the end of trial to resolve the harm.’” *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (citation omitted). Though Plaintiffs need not show “that irreparable harm already ha[s] occurred,” *Mullins v. City of New York*, 626 F.3d 47, 55 (2d. Cir. 2010), they have done just that here.

1. Plaintiffs Are Subject to Pressing and Substantial Harms.

In addition to the national emergency, Governmental Plaintiffs have declared public-health emergencies in their respective jurisdictions. (Emergency PI Mem. at 5.) Officials have taken a variety of dramatic measures to reverse the course of the pandemic, including “requir[ing] all

considered the evidence regarding COVID-19 and rejected Governmental Plaintiffs’ motion on that basis. Further, the Supreme Court did not state that its stay of the October 2019 Injunction, or refusal to modify such stay, precluded Governmental Plaintiffs’ from seeking new temporary relief tailored to the national emergency in the district court. Instead, the Supreme Court instructed that its denial “does not preclude a filing in the District Court as counsel considers appropriate.”

nonessential employees to work from home, clos[ing] schools, and issu[ing] orders to increase hospital capacity to care for COVID-19 patients.” (*Id.*) Medical care is a vital component of these efforts to “slow[] infection rates, preserv[e] hospital capacity and medical equipment, and sav[e] lives.” (*Id.* at 6.) Infected individuals who are not tested or receive inadequate medical care are more likely to spread the virus to others and experience serious complications from COVID-19, including death. (*Id.* at 6; *see also* Decl. of Elena Goldstein, Ex. 16 (Decl. of Leighton Ku), No. 19 Civ. 7777, ECF No. 170-16, ¶¶ 11–12, 20, 22.)

Plaintiffs provide ample evidence that the Rule deters immigrants from seeking testing and treatment for COVID-19, which in turn impedes public efforts in the Governmental Plaintiffs’ jurisdictions to stem the spread of the disease. Doctors and other medical personnel, state and local officials, and staff at nonprofit organizations have all witnessed immigrants refusing to enroll in Medicaid or other publicly funded health coverage, or forgoing testing and treatment for COVID-19, out of fear that accepting such insurance or care will increase their risk of being labeled a “public charge.” (*See, e.g.*, Decl. of Elena Goldstein, Ex. 8 (Decl. of Eden Almasude), No. 19 Civ. 7777, ECF No. 170-8, ¶¶ 4–8; Ex. 14 (Decl. of Dana Kennedy), No. 19 Civ. 7777, ECF No. 170-14, ¶¶ 5–9, 11–13; Ex. 15 (Decl. of Camille Kritzman), No. 19 Civ. 7777, ECF No. 170-15, ¶¶ 2–4; Ex. 16 (Decl. of Leighton Ku), No. 19 Civ. 7777, ECF No. 170-16, ¶¶ 10–11; Ex. 17 (Decl. of Pedro Moreno), No. 19 Civ. 7777, ECF No. 170-17, ¶ 4; Ex. 18 (Decl. of Bitta Mostofi), No. 19 Civ. 7777, ECF No. 170-18, ¶¶ 13, 15; Ex. 21 (Decl. of Rachel Pryor), No. 19 Civ. 7777, ECF No. 170-21, ¶¶ 13–17, 19; Ex. 22 (Decl. of Aaron Coskey Voit), No. 19 Civ. 7777, ECF No. 170-22, ¶¶ 27–28, 30; Ex. 27 (Decl. of Alejandra Aguilar), No. 19 Civ. 7777, ECF No. 170-27, ¶¶ 7–13, 18.) As a direct result of the Rule, immigrants are forced to make an impossible choice between jeopardizing public health and personal safety or

their immigration status. Defendants claim that any such effect of the Rule is based on “mistaken beliefs” about the Rule’s application and therefore cannot be fairly attributed to the Rule. (See Emergency Pl Opp’n at 15–17.) Defendants point to statements in Plaintiffs’ declarations that describe instances of immigrants incorrectly believing they are subject to the Rule or declining benefits that are not treated negatively under the Rule.¹¹ (*Id.* at 16.) However, even if immigrants act in part on mistaken belief, the Supreme Court has recognized injury where the plaintiff’s harms are based on the “predictable effect of Government action on the decisions of third parties,” even if such decisions are “motivated by unfounded fears.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). Here, such decisions are more than predictable, they are already occurring.

Any policy that deters residents from seeking testing and treatment for COVID-19 increases the risk of infection for such residents and the public. Adverse government action that targets immigrants, however, is particularly dangerous during a pandemic. Immigrants make up a substantial portion of workers in essential industries who have continued to work throughout the national emergency and interact with large swaths of the population, whether in healthcare, agriculture, food packing and distribution, or sanitation, among other industries. (See, e.g., Decl. of Elena Goldstein, Ex. 10 (Decl. of Lawrence L. Benito), No. 19 Civ. 7777, ECF No. 170-10, ¶ 11; Ex. 12 (Decl. of Sabrina Fong), No. 19 Civ. 7777, ECF No. 170-12, ¶¶ 12–13; Ex. 14 (Decl. of Dana Kennedy), No. 19 Civ. 7777, ECF No. 170-14, ¶ 15; Ex. 16 (Decl. of Leighton Ku), No. 19 Civ. 7777, ECF No. 170-16, ¶ 20; Ex. 22 (Decl. of Aaron Coskey Voit), No. 19 Civ. 7777, ECF No. 170-22, ¶¶ 9–10.) Essential workers have been disproportionately affected by COVID-19. Protecting them is in their best interest and the interest of the public at large. When

¹¹ Plaintiffs’ declarations also cite instances of immigrants avoiding benefits that may be covered by the Rule. (See, e.g., Decl. of Elena Goldstein, Ex. 8 (Decl. of Eden Almasude), No. 19 Civ. 7777, ECF No. 170-8, ¶ 6; Ex. 14 (Decl. of Dana Kennedy), No. 19 Civ. 7777, ECF No. 170-14, ¶ 11.)

individuals with a high percentage of public exposure are fearful of receiving medical care for a deadly, contagious disease, the health and security of communities across the country is jeopardized.

2. *USCIS's Alert Does Not Sufficiently Mitigate the Harms.*

USCIS's own efforts to address these substantial harms are particularly revealing, though plainly insufficient. In the first test of the Rule's immediate application, Defendants have determined that the Rule cannot be uniformly or effectively applied in response to this deadly health crisis. For good reasons, Defendants have now immediately changed the Rule by what it calls "informal guidance." That "informal guidance" presently indicates that the Rule will not be applied to certain coronavirus-related benefits. Specifically, on March 13, 2020, USCIS issued an alert that excludes "testing, treatment, [and] preventative care . . . related to COVID-19" from public charge inadmissibility determinations, "even if such treatment is provided or paid for by one or more public benefits, as defined in the [R]ule (e.g., federally funded Medicaid)." *Public Charge Alert*, U.S. Citizenship & Immigr. Servs., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge> (last updated March 27, 2020). That response is a recognition of "the possibility that some aliens impacted by COVID-19 may be hesitant to seek necessary medical treatment or preventive services." *Id.* Still, the Alert is unlikely to remedy Plaintiffs' harms considering its limited scope in the context of the Rule. As Defendants explain, an immigrant's enrollment in Medicaid will only be excluded from the public charge analysis if the immigrant enrolls "solely in order to obtain COVID-19-related testing, treatment, or preventative care" and provided the immigrant "disenrolls from Medicaid once he or she no longer needs COVID-19-related care, or provides evidence of a request to disenroll." (Decl. of Joseph B.

Edlow, No. 19 Civ. 7777, ECF No. 177, ¶ 12 (emphasis added); *see also* Emergency PI Opp'n at 13.)

Plaintiffs argue that the Alert exempts testing and treatment related to COVID-19 paid for by federally funded Medicaid, but not the enrollment in Medicaid itself. But even crediting Defendants' interpretation leaves immigrants in an impractical position. As this Court explained at oral argument, few enroll in Medicaid for a single purpose. There is no box for applicants to check off that limits their use of Medicaid to COVID-19-related treatment. (*See* Tr. of Oral Arg. dated May 18, 2020, at 59:9–17.) Defendants offer no direction regarding how an immigrant should establish that he or she enrolled in Medicaid solely to obtain COVID-19-related care. In sum, an immigrant who uses federally funded Medicaid to access COVID-19 treatment is now told that he will not be negatively impacted in a future public charge determination by such COVID-19 treatment, but his enrollment in Medicaid itself may be counted against him and any use not determined to be COVID-19 related will count against him. At a minimum, such ambiguity and strict limitations belie any notion that the Alert adequately encourages immigrants to seek medical treatment or preventative care related to COVID-19.

The Alert falls short in a number of other respects as well. First, it keeps in place the Rule's disincentives for using economic supplemental benefits. The country is experiencing a sharp economic downturn, as a predictable direct and indirect effect of the pandemic. Accordingly, many immigrants and citizens alike, who otherwise would not be classified as public charges under any reasonable definition, are experiencing substantial financial burdens as employers slash jobs, benefits, and pay. Yet, the Rule offers no meaningful relief or incentive for immigrants in such circumstances to confidently access supplemental benefits, such as SNAP. Instead, the Alert explains that an individual who:

lives and works in a jurisdiction where disease prevention methods such as social distancing or quarantine are in place, or where [his or her] employer, school, or university voluntarily shuts down operations to prevent the spread of COVID-19, . . . may submit a statement with his or her application for adjustment of status to explain how such methods or policies have affected [him or her] as relevant to the factors USCIS must consider in a public charge inadmissibility determination.

What an adequate statement should say is unknown. The Alert provides no articulable standard to which one should conform one's conduct. USCIS will then take such statement "into consideration" to the extent "relevant and credible." Such a hollow promise provides little comfort. Simply relying on the compassion or sympathy of immigration officials is not rational, either in rulemaking or in informally attempting to amend those rules.

Additionally, the exception for coronavirus-related treatment likely does not cover a wide variety of other reasonable steps that may be taken to protect public health during the pandemic. At oral argument, Defendants at least implied that if an immigrant obtained Medicaid for purposes of securing COVID-19 treatment, but during such treatment he or she was also treated for the flu, such flu treatment would not be exempt from the public charge determination because it is unrelated to COVID-19 treatment. (Tr. of Oral Arg. dated May 18, 2020, at 58–59.) It appears that an individual would be similarly penalized for utilizing Medicaid to receive treatment for medical conditions that place patients at increased risk of suffering severe illness or death if they contract COVID-19, such as chronic obstructive pulmonary disease (COPD), Type 2 diabetes, or serious heart conditions. *See Coronavirus Disease 2019 (COVID-19) – People of Any Age with Underlying Medical Conditions*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated July 17, 2020).

Finally, at oral argument, Defendants conceded that USCIS has no obligation to retain the Alert for any period of time, let alone for the pendency of the public health emergency. (Tr. of

Oral Arg. dated May 18, 2020, at 75:16–25.) Nor is there any protection from a retroactive change in policy.¹² The characterization of the published “alert” as “informal guidance” outside of rulemaking provides no assurance of its future reliability. Any semblance of a mitigating effect that the Alert has on the tangible harms caused by the Rule’s general application may be wiped out at a moment’s notice. The uncertainty surrounding the scope of the Alert’s coronavirus treatment exception further adds confusion and chaos. It defeats the stated purpose of encouraging immigrants to seek COVID-19 diagnosis and treatment.

3. The Balance of the Equities and Public Interest Decidedly Favor Temporary Injunctive Relief During the National Health Emergency.

Considering the substantial harm to the public caused by the Rule during the present pandemic, the balance of the equities and public interest also strongly favor an injunction. While the Rule has only been in effect since February 24, 2020, the prior public charge framework has been uniformly applied for decades. (Gov’t Pls. Decision at 21.) Defendants’ interest in effectuating the Rule fails to measure up to the gravity of this global pandemic that continues to threaten the lives and economic well-being of America’s residents. No person should hesitate to seek medical care, nor should they endure punishment or penalty if they seek temporary financial aid as a result of the pandemic’s impact.

Moreover, Defendants’ new “informal guidance” that attempts to carve out a COVID-19 exception is an admission that it is neither in the public interest nor compelled by the balance of equities to currently apply the Rule as written and adopted. Plainly, Defendants have indicated that the Rule’s uniform application is likely to be injurious to Plaintiffs, immigrants, and the public

¹² Defendants asserted at oral argument that “as long as the policy is in place, people who use benefits in a way that’s described by the policy, they can be sure that at any point in the future, if they submit an application for adjustment of status, this is the policy that will be applied to their benefit usage that occurred while this policy was in place.” (Tr. of Oral Arg. dated May 18, 2020, at 75:5–10.) This Court is aware of no legal obligation that accompanies this pledge, in the Alert, the Rule, or otherwise.

at large during this national public health emergency. The problem is not with the decision to issue the Alert or declare a public health emergency, but with the Rule. All agree that the Rule should not to be applied, as written, during this current pandemic. There is also a question of whether it should be applied to future deadly plagues, earthquakes, hurricanes, tornadoes, floods, or other natural and manmade disasters that threaten the health and safety of citizens and immigrants alike, through no fault of their own. The Rule has demonstrably failed the first real world test of its application.

C. A Nationwide Temporary Injunction is Appropriate.

As this Court found with respect to its initial injunction regarding the Rule, and for additional reasons, a nationwide injunction is both necessary to redress the harms caused by the Rule, and appropriate given the strong federal interest in uniformity of the national health and immigration policies at issue here. (*See* Gov’t Pls. Decision at 21–24; Org. Pls. Decision at 24–26); *see also* *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) (upholding a nationwide injunction of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) immigration relief program, in part, because the Constitution requires and Congress has called for uniform administration of immigration laws). The scope of preliminary injunctive relief generally should be “no broader than necessary to cure the effects of the harm caused by the violation,” *Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmBH*, 843 F.3d 48, 72 (2d Cir. 2016), but “is dictated by the extent of the violation established, not by the geographical extent of the plaintiff,” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The likely unlawful agency action in this case applies universally, to every public charge determination made by immigration officials across the country. Limited relief would simply not protect the interests of all stakeholders. A geographically restricted injunction, in particular, would undoubtedly result in

inconsistent applications of the Rule, and different public charge determinations based solely on location. The effect of the Rule’s application should not depend on what side of the George Washington bridge between New York and New Jersey one fortuitously finds oneself.

Moreover, as Plaintiffs correctly point out, nationwide relief is critical to curing Plaintiffs’ harms associated with the pandemic, considering the “interconnected nature of the risks between and within states, and the realities attendant to the spread of this disease.” (Emergency PI Mem. at 25.) Even Defendants’ limited COVID-19 exception does not distinguish its benefits geographically. A patchwork public charge framework would only contribute to the spread of COVID-19 in our communities. As we have all come to recognize, the virus knows no artificial boundaries. And as the country returns to business, so too will interstate travel and commerce. Each infected individual that travels to Governmental Plaintiffs’ jurisdictions risks undoing crucial progress made in combatting this disease. Discouraging noncitizens nationwide from obtaining necessary treatment and care certainly undermines those efforts. Issuing geographically limited relief would not meaningfully abate the public health risk, especially when applied to a population that represents a significant portion of essential workers who continue to work outside of their homes and interact with the public at large. Thus, a temporary injunction entirely barring the Rule is appropriate.¹³

¹³ This Court is cognizant of the equitable and constitutional concerns regarding nationwide injunctions. *See, e.g., Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (Gorsuch, J., concurring). Nevertheless, in the appropriate circumstances, “district courts sitting in equity have the authority to issue nationwide injunctions.” *Saget v. Trump*, 375 F. Supp. 3d 280, 378 (E.D.N.Y. 2019) (citing *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451 (1932)). To be sure, a court’s authority to issue nationwide injunctions is a power that should be exercised sparingly, and certainly cannot be applied in conflict with each circuit’s own determination of its appropriateness. This Court certainly does not discount legitimate concerns, but concludes that the convoluted geographic patchwork of artificially limited temporary relief, in this case, is just as likely to be “patently unworkable, sowing chaos for litigants, the government, courts, and all those affected.” *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring) (discussing the costs associated with nationwide injunctions).

III. CONCLUSION

Defendants' motion to dismiss, (No. 19 Civ. 7993, ECF No. 176), Count III of Organizational Plaintiffs' complaint, claiming that DHS and USCIS lacked authority to promulgate the Rule, is GRANTED.

Plaintiffs' motion for a preliminary injunction, and temporary stay of the Rule's application under 5 U.S.C. § 705, (No. 19 Civ. 7777, ECF No. 168), is GRANTED. Defendants are enjoined from enforcing, applying, implementing, or treating as effective the Rule for any period during which there is a declared national health emergency in response to the COVID-19 outbreak.

This opinion shall also serve alternatively as an indicative ruling under Federal Rule of Civil Procedure 62.1. Should the Second Circuit determine that this Court does not presently have jurisdiction to issue this injunction and remands this case for the purpose of further considering Plaintiffs' present motion, this Court would issue a preliminary injunction based on factual findings as set forth herein.

The Court of Clerk is directed to close the motions, (No. 19 Civ. 7777, ECF Nos. 140, 168; No. 19 Civ. 7993, ECF No. 176), accordingly.

Dated: New York, New York
July 29, 2020

SO ORDERED.


GEORGE B. DANIELS
United States District Judge