No. 20-2537

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, CITY OF NEW YORK, STATE OF CONNECTICUT, STATE OF VERMONT, MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, ASIAN AMERICAN FEDERATION, CATHOLIC CHARTIES COMMUNITY SERVICES (ARCHDIOCESE OF NEW YORK), and CATHOLIC LEGAL IMMIGRATION NETWORK INC.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, SECRETARY CHAD F. WOLF, in his official capacity as Acting Secretary of the United States Department of Homeland Security, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, DIRECTOR KENNETH T. CUCCINELLI II, in his official capacity as Acting Director of United States Citizenship and Immigration Services, and UNITED STATES OF AMERICA.,

Defendants-Appellants.

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

BRIEF FOR APPELLANTS

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

AUDREY STRAUSS
Acting United States Attorney

DANIEL TENNY
GERARD SINZDAK
JOSHUA DOS SANTOS
JACK STARCHER
Attorneys, Appellate Staff
Civil Division, Room 7515
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-8877

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INTRODUCTION

This appeal arises from a 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). This is not the first preliminary injunction the district court has issued against that Rule. The district court had previously issued preliminary injunctions against the Rule in these cases (before they were consolidated). The government appealed those preliminary injunctions to this Court, and the Supreme Court stayed those injunctions pending resolution of that appeal, including any petition for certiorari. *U.S. Department of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (mem.). Indeed, each of the five preliminary injunctions issued against the Rule by various district courts around the country had been stayed, either by the courts of appeals or by the Supreme Court. *See Wolf v. Cook County*, 140 S. Ct. 681 (2020) (mem.); *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773 (9th Cir. 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 district court's original preliminary injunctions was pending in this Court, the court issued a new preliminary injunction preventing DHS from enforcing the Rule, and gave that

injunction nationwide scope. The new injunction was premised entirely on the merits arguments that were already at issue in the previous appeal. The court justified a new preliminary injunction against the same Rule in the same cases based on the same merits arguments by stating that the COVID-19 pandemic heightens the irreparable harms plaintiffs and the public face under the Rule.

That was error. As an initial matter, after the government appealed the preliminary injunctions in fall 2019, the district court no longer had jurisdiction over the preliminary-relief aspect of this case because the filing of a notice of appeal strips the district court of its control over aspects of the case involved in the appeal. The district court cannot simply keep granting new preliminary injunctions to frustrate pending appeals of earlier preliminary injunctions, and to override stays pending appeal issued by the Supreme Court with respect to those earlier preliminary injunctions.

Even if the district court had jurisdiction, the new preliminary injunction here would still be improper. The effect of the new injunction is to override the Supreme Court's stay of the original injunction, which was premised on that Court's assessment of plaintiffs' likelihood of success on the merits and the irreparable harms that a preliminary injunction of the Rule will cause the government. The district court entirely failed to acknowledge the import of the Supreme Court's stay.

Furthermore, the circumstances on which the district court relied to issue the new preliminary injunction provide no basis for effectively reviving the earlier

preliminary injunctions that the Supreme Court stayed. The COVID-19 pandemic has no bearing on plaintiffs' likelihood of success on the merits, and the district court did not suggest otherwise. The district court was also 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 district court issued its 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.

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 OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331, raising claims under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and the Constitution. Joint Appendix (JA) 67, 156.[1] The district court

[1] In the appeal of the prior preliminary injunction, this Court held that plaintiffs have Article III standing to pursue injunctive relief against the Rule. *See New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 59-62 (2d Cir. 2020). For purposes of this

entered the challenged preliminary injunction on July 29, 2020. Special Appendix (SA) 31. For the reasons given below, the district court did not have jurisdiction to issue that preliminary injunction. *See infra* Part I. The government filed a timely notice of appeal on August 3, 2020. JA 563. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court lacked jurisdiction to issue a new preliminary injunction while the government's appeal of prior preliminary injunctions was pending before this Court.

2. Whether the district court abused its discretion in granting a new preliminary injunction, where the Supreme Court had stayed the district court's earlier preliminary injunctions against the Rule.

3. Whether the district court erred in failing to limit the geographic scope of its injunction.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the Special Appendix.

STATEMENT OF THE CASE

This appeal arises out of a challenge to the Department of Homeland Security's promulgation of a final rule implementing the Immigration and Nationality Act's

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appeal, the government accepts that plaintiffs have standing in light of this Court's earlier decision.

(INA) public-charge inadmissibility provision, 8 U.S.C. § 1182(a)(4). While an appeal from earlier preliminary injunctions the district court had entered against the Rule in these cases was pending in this Court, and while those earlier preliminary injunctions were stayed pursuant to an order by the Supreme Court, plaintiffs sought a new preliminary injunction that would bar DHS from implementing the Rule in light of the COVID-19 pandemic. On July 29, 2020, the district court (Daniels, J.) entered a new nationwide preliminary injunction enjoining DHS from enforcing the Rule "for any period during which there is a declared national health emergency in response to the COVID-19 outbreak." SA 31. The government appeals under 28 U.S.C. § 1292(a)(1).

A. Statutory and Regulatory Background

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).[2] 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." 8 U.S.C. § 1182(a)(4)(B). A separate INA provision provides that an alien is deportable if, within five years of

[2] 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; *see also* 6 U.S.C. § 211(c)(8).

entry, the alien "has become a public charge from causes not affirmatively shown to have arisen" since entry. 8 U.S.C. § 1227(a)(5).

Three agencies make public-charge inadmissibility determinations under this provision: DHS for aliens seeking admission at the border and aliens within the country who apply to adjust their status to that of a lawful permanent resident; the Department of State when evaluating visa applications filed by aliens abroad; and the Department of Justice when the question arises during removal proceedings. *See* 84 Fed. Reg. at 41,294 n.3. The Rule at issue governs DHS's public-charge inadmissibility determinations. *Id.* The State Department has adopted consistent guidance—though it is the subject of separate litigation and a separate preliminary injunction—and the Department of Justice is expected to do so. *Id.*; 84 Fed. Reg. 54,996 (Oct. 11, 2019) (State Department interim final rule).[3]

2. Although the public-charge ground of inadmissibility dates back to the first immigration statutes, Congress has never defined the term "public charge," instead leaving the term's definition and application to the Executive Branch's discretion. In 1999, the Immigration and Naturalization Service (INS) proposed a rule to "for the first time define 'public charge,'" 64 Fed. Reg. 28,689 (May 26, 1999) (1999

[3] Some of the plaintiffs in this case also challenged the State Department rule. *See Make the Road v. Pompeo*, No. 19-cv-11633 (S.D.N.Y.). The district court issued a preliminary injunction barring implementation of the State Department rule on July 29, 2020. *See id.*, ECF No. 88. The government filed a notice of interlocutory appeal of that preliminary injunction on September 22, which has been docketed as No. 20-3214 (2d Cir.).

Guidance), a term that the INS noted was "ambiguous" and had "never been defined in statute or regulation," 64 Fed. Reg. 28,676, 28,676-28,677 (May 26, 1999). The proposed rule would have defined "public charge" to mean an alien "who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) [t]he receipt of public cash assistance for income maintenance purposes, or (ii) [i]nstitutionalization for long-term care at Government expense." *Id.* at 28,681 (quoting 8 U.S.C. § 1182(a)(4)(A)). When it announced the proposed rule, INS also issued "field guidance" adopting the proposed rule's definition of "public charge." 64 Fed. Reg. at 28,689. The proposed rule was never finalized, leaving only the 1999 field guidance in place. 84 Fed. Reg. at 41,348 n.295.

3. In October 2018, DHS announced a new approach to public-charge inadmissibility determinations. It did so through a proposed rule subject to notice and comment. 83 Fed. Reg. 51,114 (Oct. 10, 2018) (NPRM). After responding to comments received during the comment period, DHS promulgated the Rule on August 14, 2019. 84 Fed. Reg. at 41,501. The Rule is the first time the Executive Branch has defined the term "public charge," and established a framework for evaluating whether an alien is likely to become a public charge, in a final rule following notice and comment.

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 designated public benefits include cash assistance for income maintenance and certain non-cash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. *Id.* As the agency explained, the Rule's definition of "public charge" differs from the 1999 Guidance in that: (1) it incorporates certain non-cash benefits; and (2) it replaces the "primarily dependent" standard with the 12-month/36-month measure of dependence. *Id.* at 41,294-41,295.

The Rule also sets forth a framework the agency will use to evaluate whether, considering the "totality of an alien's individual circumstances," the alien is "likely at any time in the future to become a public charge." 84 Fed. Reg. at 41,369; *see id.* at 41,501-41,504. Among other things, the framework identifies a number of factors an immigration official must consider in making a public-charge inadmissibility determination, such as the alien's age, financial resources, employment history, education, and health. *Id.* at 41,501-41,504. The Rule was set to take effect on October 15, 2019, and was originally set to apply prospectively to applications and petitions postmarked (or, if applicable, submitted electronically) on or after that date. *Id.* at 41,292.

B. Prior Proceedings

1. In separate lawsuits (since consolidated), two sets of plaintiffs—the States of New York, Connecticut, and Vermont, and the City of New York in one case, and four nonprofit organizations in the other—challenged the Rule. Plaintiffs allege that

the Rule's definition of "public charge" is not a permissible construction of the INA. Plaintiffs urge that the term unambiguously includes only persons who are primarily dependent on the government for subsistence. Plaintiffs further allege that the Rule is arbitrary and capricious, and violates the Rehabilitation Act. The organizational plaintiffs additionally assert that the Rule violates equal protection.

2. On October 11, 2019, the district court granted plaintiffs' motions for nationwide preliminary injunctions barring DHS from implementing the Rule. *See* JA 265, 292. The court concluded that plaintiffs had standing to challenge the Rule because aliens are expected to disenroll from public benefits in response to the Rule, imposing financial burdens on the governmental plaintiffs and requiring the organizational plaintiffs to expend additional resources. JA 273-275, 300-304. The district court also concluded that plaintiffs fell within the zone of interests the public charge inadmissibility provision was intended to protect. JA 277, 305-306.

On the merits, the court concluded that plaintiffs were likely to prevail on their claims that the Rule's definition of "public charge" is not a reasonable interpretation of the public-charge inadmissibility provision and that the Rule is arbitrary and capricious. JA 280, 281-282, 308, 310. The court further concluded that the organizational plaintiffs had raised serious questions regarding whether the Rule violated equal-protection principles, and that plaintiffs had raised a "colorable argument" that the Rule violates the Rehabilitation Act. JA 285, 313-315.

Regarding the other preliminary-injunction factors, the court concluded that the injuries plaintiffs anticipated experiencing as a result of the Rule—*i.e.*, harms to the States' and City's economic interests and to the organizational plaintiffs' ability to carry out their missions—were irreparable. JA 286-287, 316. The court also found that the balance of equities and public interest weighed in favor of a preliminary injunction. JA 287-288, 316-318. In the court's view, whereas Plaintiffs and the public would experience irreparable "economic and public health" harms if the Rule were to go into effect, barring DHS from implementing the Rule would cause the government no "actual hardship." JA 287-288, 317-318.

Finally, the court concluded that a nationwide injunction was appropriate, rejecting the government's argument that limiting the injunction's reach to the State plaintiffs' jurisdictions was all that was necessary to remedy plaintiffs' injuries. JA 289-290, 318-320. The court concluded that a nationwide injunction was necessary to promote "uniformity" in "national immigration policies." JA 289, 318. The court also concluded that nationwide relief was appropriate because a limited injunction might discourage residents of plaintiff States from moving out of state.

The United States appealed the district court's nationwide preliminary injunctions and sought stays pending appeal from this Court and then the Supreme Court. This Court denied the stay, but on January 27, 2020, the Supreme Court stayed the 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." JA 327. That stay remains in effect.

3. Other plaintiffs also challenged the rule in Illinois, Maryland, California, and Washington. The district courts in those cases 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 & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773 (9th Cir. 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 (4th Cir. 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. *Casa de Maryland, Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020), *petition for reh'g en banc pending*.

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 this Court's stay issued in these cases, the Supreme Court then stayed that injunction. *Wolf v. Cook County*, 140 S. Ct. 681 (2020). A divided Seventh Circuit panel subsequently affirmed the Illinois preliminary injunction. *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020). The Seventh Circuit unanimously held that the term "public charge" does not have a settled meaning that Congress implicitly adopted. *Id.* at 226. But the majority

nonetheless concluded that the Rule was an unreasonable interpretation of the public-charge inadmissibility statute. *Id.* at 229. 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 a court of appeals, the Rule went into effect on February 24, 2020.

4. In April 2020, the City and State 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 21-22, *U.S. Dep't of Homeland Sec. v. New York*, No. 19A785 (U.S. Apr. 13, 2020). 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 in an order stating that "this order does not preclude a filing in the District Court as counsel considers appropriate." JA 332.

Plaintiffs then filed a motion in district court seeking a new preliminary injunction, again relying on the COVID-19 pandemic. Three months later, on July 29, 2020, the district court granted plaintiffs' motion and issued a nationwide injunction for the duration of the national emergency associated with the COVID-19 pandemic. *See* SA 1. 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. SA 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. SA 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." SA 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, SA 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,'" SA 25-28.

The government filed a notice of appeal and sought a stay pending appeal from the district court on August 3, 2020.

5. On August 4, 2020, this Court issued its merits ruling in the government's appeal of the original preliminary injunctions, limiting the scope of the injunctions to the geographic boundaries of the Second Circuit and affirming the injunctions as so

limited. *See New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42 (2d Cir. 2020). This Court held that plaintiffs had Article III standing, and that they fell within the statutory zone of interests. On the merits, although the court acknowledged that "the principles at issue are broad enough that they may support a variety of agency interpretations," *id.* at 75, the court held that the term "public charge" acquired a settled range of meaning through judicial and administrative interpretation, and that Congress adopted that meaning when it enacted the current public-charge inadmissibility statute in 1996. This Court concluded, in particular, that "public charge" means "a person who is unable to support herself, either through work, savings, or family ties," and that the Rule goes beyond that definition. *Id.* at 71. This Court also concluded that the Rule is likely arbitrary and capricious because DHS failed to provide an adequate reason for departing from prior guidance. Finally, this Court concluded that plaintiffs had established they faced irreparable injury absent an injunction, and that the balance of the equities favored the injunction.

As for the injunction's scope, this Court noted that "where, as here, numerous challenges to the same agency action are being litigated simultaneously in district and circuit courts across the country," a district court should not lightly enjoin that agency action nationwide. *New York*, 969 F.3d at 88. This Court therefore exercised its discretion to narrow the injunction to apply only within the Second Circuit. *Id.* This Court also acknowledged that, despite its ruling, the Supreme Court's stay of the original preliminary injunctions remains in effect. *Id.*

6. On August 7, 2020, the government sought a stay pending appeal of the district court's new injunction, at issue in this case. On August 12, 2020, Judge Hall granted a temporary partial stay of the new injunction, limiting its effect to states located in the Second Circuit while the motions panel continued to consider the government's motion. *See* Mot. Order, *New York v. U.S. Dep't of Homeland Sec.*, No. 20-2537 (2d. Cir.).

On September 11, 2020, this Court granted the government's motion for a stay of the new preliminary injunction. This Court held that the government had "shown that it is likely to succeed on the merits" of this appeal, "primarily because" the motions panel "doubt[ed] that the district court had jurisdiction to issue the July 29 preliminary injunction while the appeal of its virtually identical prior preliminary injunction[s] w[ere] pending before this Court." JA 574. The Court also "conclude[d] that DHS has shown irreparable injury from the district court's prohibition on effectuating the new regulation." *Id.* The Court made clear that its views regarding the district court's jurisdiction and the nationwide scope of the injunction "are intended solely as informing our assessment of whether the moving party demonstrated likelihood of success on the merits and are not intended to bind the merits panel on that question." JA 577.

SUMMARY OF ARGUMENT

The district court erred in entering a new preliminary injunction barring enforcement of the Rule.

I. At the threshold, as the motions panel recognized, the district court did not have jurisdiction to issue a new preliminary injunction while this Court was considering an appeal from a prior, virtually identical preliminary injunction. Filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of its control over aspects of the case involved in the appeal. After the government appealed the district court's earlier preliminary injunctions last year, the district court lost jurisdiction over the preliminary-relief aspect of this case.

None of the district court's justifications for disregarding that rule are valid. This case is not comparable to cases where a district court issues a permanent injunction while an appeal of an earlier preliminary injunction is pending in this Court. The district court here did not proceed to the merits and moot its earlier preliminary injunction by issuing a final judgment; instead it merely provided additional justifications for the same preliminary relief that was already pending before this Court.

Nor did the Supreme Court's statement that its order denying plaintiffs' motion to lift or modify the stay did not itself "preclude a filing in the District Court as counsel considers appropriate," JA 332, somehow confer jurisdiction on the district court to issue new or modified preliminary relief despite the pending appeal in this Court.

II. Even if the district court had jurisdiction to issue a new preliminary injunction, it was an abuse of discretion for it to do so here. The Supreme Court

indicated that the government—not plaintiffs—is likely to succeed on the merits of this appeal. Neither the district court nor plaintiffs have ever suggested that the COVID-19 pandemic or any other changed circumstances bear on that conclusion. Rather than acknowledging the clear implications of the Supreme Court's stay, the district court implausibly concluded that the Supreme Court's stay gave "no indication that the Supreme Court disagreed with [the district court's] analysis of the merits of Plaintiffs' case" and therefore incorporated its earlier merits analysis wholesale. SA 21. Even if the district court were entitled to consider anew whether the Rule should remain in effect before the Supreme Court has an opportunity to engage in plenary review, the district court was not at liberty to ignore the implications of the Supreme Court's order entirely.

As to the balance of the equities, the district court further erred in concluding that the COVID-19 pandemic has somehow tipped the balance in plaintiffs' favor. The district court concluded that the Rule is causing additional harm during this national health crisis because individuals are declining to take advantage of public healthcare benefits out of fear that any benefits usage will be counted against them in the public charge calculus. But both plaintiffs and the district court acknowledge that those harms flow not from the Rule itself, but rather from third parties' misunderstandings of the Rule. Neither plaintiffs nor the district court have made any showing that the injunction would actually avert these harms. If the Rule's operation does not cause the harms plaintiffs complain of, then it is implausible to think that

suspending the Rule's operation—especially through a temporary preliminary injunction—would cure those harms. And the district court entirely failed to account for considerations in the other direction, such as the fact that the new injunction, unlike the old ones, altered the status quo.

III. At a minimum, the district court abused its discretion in entering a nationwide injunction. Plaintiffs here allege harms stemming from application of the Rule to their residents and the individuals they serve. An injunction barring enforcement of the Rule within the relevant states would remedy those harms. The district court's decision to nevertheless issue an injunction with nationwide scope runs afoul of the fundamental principle that an injunction must be narrowly tailored to remedy the specific harms shown.

As this Court recognized in narrowing the district court's earlier nationwide injunctions, the nationwide scope of the injunction is particularly problematic here given that the Supreme Court and other Circuits have stayed other preliminary injunctions issued across the country. In those circumstances, a single district court should not be allowed to dictate treatment of the Rule for the entire country.

STANDARD OF REVIEW

Challenges to the district court's jurisdiction are reviewed de novo. *See Sharkey v. Quarantillo*, 541 F.3d 75, 82 (2d Cir. 2008). When reviewing a district court's decision on a preliminary injunction, this Court reviews the district court's legal conclusions de novo. *Malkentzos v. DeBuono*, 102 F.3d 50, 54 (2d Cir. 1996).

Otherwise, the district court's entry of a preliminary injunction is reviewed for abuse of discretion. *Id.*

ARGUMENT

I. The District Court Did Not Have Jurisdiction To Issue The New Preliminary Injunction

A. "The filing of a notice of appeal is an event of jurisdictional significance—it 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." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982); *accord Leonhard v. United States*, 633 F.2d 599, 609 (2d Cir. 1980) ("[T]he filing of a timely and sufficient notice of appeal immediately transfers jurisdiction, as to matters involved in the appeal, from the district court to the court of appeals."). Thus, "[o]nce a proper appeal is taken," the district court lacks jurisdiction over all "matters involved in the appeal," and "may generally take action only in aid of the appeal or to correct clerical errors as allowed by" the Federal Rules of Civil Procedure. *Leonhard*, 633 F.2d at 609-610. Pursuant to that well-established rule, the district court did not have jurisdiction to issue its new preliminary injunction. After the government appealed the preliminary injunctions in fall 2019, the district court no longer had jurisdiction over the preliminary-relief "aspect[] of the case." *Griggs*, 459 U.S. at 58.

That jurisdictional bar applies with full force here. The new preliminary injunction necessarily turns on "matters involved in the appeal" of the original

preliminary injunctions, *Leonhard*, 633 F.2d at 609, including plaintiffs' likelihood of success on the merits and the degree of harm an injunction blocking the Rule will cause to the government and the public. Indeed, the district court recognized as much in its order: rather than conducting any analysis of plaintiffs' likelihood of success on the merits, the district court simply incorporated by reference its earlier merits analysis regarding the very issues that were then pending before this Court. *See* SA 22 ("[T]his Court has already found that Plaintiffs are likely to succeed on the merits of their claims.").

But this is not merely a case involving "[o]verlapping legal issues between [the district court's] previous" preliminary injunction and the instant preliminary injunction. SA 20. As the motions panel recognized in granting the government's motion for a stay pending appeal, "the district court undertook to reconsider the very preliminary injunction that was under review in this Court, and simply provided new reasons to justify the preliminary relief itself." JA 575. This preliminary injunction is "virtually identical" to the district court's earlier injunctions. JA 574. It enjoins the same challenged Rule based on the same merits claims brought by the same plaintiffs, and it again does so nationwide. The only differences are that this new injunction is not subject to the Supreme Court's stay of the earlier preliminary injunctions, and that it is time-limited, applying only "for any period during which there is a declared national health emergency in response to the COVID-19 outbreak," SA 31, whereas the earlier injunction contained no such expiration date. Neither of those differences

establishes that this injunction is an entirely new matter for purposes of assessing the district court's jurisdiction.

The idea that a district court can simply rebalance the harms and reissue an injunction while an appeal is pending—particularly an injunction that has been stayed—would swallow the principle that an appeal to this Court deprives the district court of jurisdiction to alter the order on appeal. In every case, a plaintiff could identify some "new circumstances not previously considered" by the district court in issuing a preliminary injunction pending on appeal. SA 14. And in every case, a plaintiff could ask the district court for only a subset of the total relief granted by the preliminary injunction on appeal. If that were enough to allow the district court to get around the jurisdictional bar, every appeal of a preliminary injunction could become a moving target for both this Court and litigants, raising the prospect of on-again-off-again injunctions as cases bounce back and forth between orders from a district court firmly convinced that an injunction should be in place and orders from this Court or the Supreme Court directing that it should not be.

B. The district court acknowledged the potential that a reviewing court might determine that it did not "have jurisdiction to issue this injunction," and therefore issued a Rule 62.1 indicative ruling in the alternative. SA 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, *New York*, No. 19A785.

The district court nevertheless concluded that it had jurisdiction to issue this preliminary injunction, analogizing to cases where a district court issues a permanent injunction while an appeal of a preliminary injunction is pending on appeal. 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." SA 20. When a district court makes a dispositive ruling on the merits and issues a permanent injunction, that permanent injunction renders an appeal of an earlier preliminary injunction moot, ending that appeal and removing the possibility for any conflict or confusion between the district court and the court of appeal. *See Webb v. GAF, Corp.*, 78 F.3d 53, 53-56 (2d Cir. 1996). That is not analogous to what the district court did here. The district court did not advance the litigation here by proceeding to final judgment. As the motions panel recognized, the district court instead "undertook to reconsider the very preliminary injunction that was under review in this Court, and simply provided new reasons to justify the preliminary relief itself." JA 575.

Nor does *International Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Eastern Air Lines, Inc.*, 847 F.2d 1014 (2d Cir. 1988), suggest that the district court had jurisdiction to issue this injunction. As the motions panel recognized, that case held only that, "where an appeal of an injunction is pending, Federal Rule of Civil Procedure 62 grants the district court specific authority to 'suspend, modify, restore,

or grant an injunction during the pendency of the appeal,' but that the Rule should be 'narrowly interpreted to allow district courts to grant only such relief as may be necessary to preserve the status quo.'" JA 575-576.[4] Here, far from preserving the status quo, the district court's new preliminary injunction has the effect of circumventing a Supreme Court stay. *See* JA 327. "The district court's injunction thus disrupted the status quo by imposing an injunction where the Supreme Court had stayed the preexisting injunctions." JA 576.

The Supreme Court's statement, when denying plaintiffs' motion to lift or modify the stay, that "this order does not preclude a filing in the District Court as counsel considers appropriate," JA 332, did not somehow confer jurisdiction on the district court to nullify the Supreme Court's decision. The City and State plaintiffs had asked the Supreme Court, if it was unwilling to modify its stay, to instead "clarify that its stay does not preclude the district court here from considering whether" to impose new injunctive relief in light of the COVID-19 pandemic. Mot. to Lift Stay 1-2, *New York*, 19A785 (emphasis added). The government countered that such alternative relief would be inappropriate because the district court would probably "lack the authority to end run" the existing stay "by issuing a materially identical 'new' injunction." Gov't Resp. in Opp'n 17, *U.S. Dep't of Homeland Sec. v. New York*, No.

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

19A785 (U.S. April 20, 2020). In observing that "[t]his Order does not preclude" a request for injunctive relief directed to the district court, the Supreme Court simply made clear that it was not resolving that dispute. JA 332; *see* JA 574 (concluding that Supreme Court's statement "does not mean the district court was vested with jurisdiction"). Indeed, the Supreme Court notably 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, *New York*, 19A785.

II. The District Court Abused Its Discretion In Issuing A New Preliminary Injunction Despite The Supreme Court's Stay Of The Earlier Preliminary Injunctions In These Cases.

A. 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 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.

The only practical effect of the district court's new preliminary injunction was to override the Supreme Court's determination and to prohibit the Rule from remaining in effect while appellate review of the prior injunctions proceeds. Even if a

district court had jurisdiction to reissue a preliminary injunction with new justifications while an appeal of a previously issued, substantively identical preliminary injunction was pending, it would not be appropriate to do so in the unusual circumstance where the earlier preliminary injunction has been stayed pending appeal by this Court or the Supreme Court.

Such second-guessing of an appellate court's stay pending appeal was especially egregious here, where the district court failed to identify any changed circumstances that would alter the Supreme Court's merits analysis. The district court implausibly suggested that the Supreme Court's stay provided "no indication that the Supreme Court disagreed with [the district court's] analysis of the merits of Plaintiffs' case." SA 21. There is no basis for the district court's unlikely suggestion that the Supreme Court issued a stay while remaining agnostic on the merits. Rather, 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, *U.S. Dep't of Homeland Sec. v. New York*, No. 19A785 (U.S. Jan. 13, 2020), and the Supreme Court necessarily held that there was a fair prospect that the government would succeed on appeal, *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009). Moreover, the stay here was granted by the whole Court, not a single Justice. *See* JA 327 (referring application presented to Justice Ginsburg to whole Court). That no Justice wrote an opinion about the merits of the case as opposed to the nationwide scope of the injunction, SA 10, is immaterial, as the Court stayed the injunction in its

entirety rather than limiting its scope. In addition, 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 (2020).

B. The district court appeared to recognize that it would not be appropriate, even if it had jurisdiction to do so, to issue a new injunction based on the same record merely to override the Supreme Court's stay of the previous injunctions. The district court's injunction thus relies heavily on its conclusion that circumstances have materially changed since the Supreme Court issued its stay. In particular, the district court concluded that the Rule's perceived effects on the COVID-19 public health response constitute changed circumstances that justify a new preliminary injunction against the Rule. That conclusion is deeply flawed.

As an initial matter, the emergence of the COVID-19 pandemic does not in any way affect the *legality* of the Rule, which was finalized in August 2019. *See* 84 Fed. Reg. 41,292 (Aug. 14, 2019). Neither plaintiffs nor the district court have ever suggested otherwise. Thus, there has been no change of circumstances whatsoever relevant to the merits of these cases since the Supreme Court assessed the government's likelihood of success on the merits and issued a stay.

The district court instead suggested that circumstances had changed with regard to the balance of equities. The district court premised its decision on its view that the Rule was likely to discourage the use of benefits during the COVID-19 pandemic. But the effects the district court identified flow not from the Rule itself

but rather from third parties' misunderstandings of the Rule. As this Court recognized, longstanding statutory provisions make "non-citizens who are present in the United States illegally or who are admitted in a lawful non-immigrant (*i.e.*, temporary) status . . . ineligible for almost all federal benefits." *New York*, 969 F.3d at 53. As a result, the vast majority of aliens to whom the Rule is applicable—those who seek initial admittance to the United States or who seek to change their status to that of a lawful permanent resident—are not currently eligible to receive the benefits on which the Rule is focused. *See Cook County v. Wolf*, 962 F.3d 208, 237 (7th Cir. 2020) (Barrett, J., dissenting) (noting that aliens seeking admission or to adjust to LPR status "are ineligible for the relevant benefits is their current immigration status").

And with respect to the few aliens who are both currently eligible for public benefits and subject to the Rule, 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 necessary medical treatment or preventive services related to COVID-19. *See* JA 334. USCIS's March 13 guidance makes clear that USCIS will not consider the receipt of any public benefits related to COVID-19 care—including testing, treatment, preventive care, and vaccinations—when making public-charge inadmissibility determinations under the Rule. 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." JA 334. And more generally, the alert clarified that the

context of the COVID-19 pandemic will be taken into account in the totality of the circumstances. *See id.*

The district court nevertheless cited evidence put forward by plaintiffs indicating that aliens have "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. SA 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 district court provided no basis to believe that the injunction would actually avert the threatened harm. It is not plausible that individuals who are avoiding public benefits based on unfounded fears about its future application will suddenly change their behavior based on the issuance of a preliminary injunction by the district court in this case. 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 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 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 that plaintiffs identify. Accordingly, the district court's new preliminary injunction is unlikely to address the very harms that ostensibly justified its issuance.

On the other side of the ledger—as the Supreme Court and this Court have concluded—both the government and the public will be irreparably harmed by the renewed injunction. *See* JA 577; *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 injunction will likely 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* Dkt. No. 113, ¶ 4. Neither the district court nor plaintiffs suggest that the COVID-19 pandemic has diminished those irreparable harms.

To the contrary, the only change in circumstances relevant to the government's harm renders the new injunction even less appropriate that the old ones. The Rule had been in effect for more than five months at the time of the district court's injunction. The new injunction is therefore subject to even higher scrutiny than the 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) (quotation marks omitted). 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 effects of the Rule and depriving aliens and the government of clarity about which scheme should apply.

C. 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*, 969 F.3d at 80-81. 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. Plaintiffs' equal-protection and Rehabilitation Act claims, which this Court did not reach in its decision, are also meritless for the reasons given in the government's prior briefing.

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. Unlike this Court's merits ruling, the district court's decision to issue a new preliminary injunction contributes no new merits analysis for the Supreme Court to consider in the event that certiorari is ultimately granted. Instead, the district court simply concluded that, in light of its prior merits analysis, the Rule should be enjoined. *See* SA 22 ("[T]his Court has already found that Plaintiffs are likely to succeed on the merits of their claims."). On that point, the Supreme Court's analysis should control, as this Court properly recognized. *See New York*, 969 F.3d at 88. At the very least, the district court should have acknowledged the implications of the Supreme Court's stay and explained why a new injunction was necessary "right upon the heels of the Supreme Court's stay order necessarily concluding" that the government, not plaintiffs, are likely to succeed on the merits. *Casa de Maryland v. Trump*, 971 F.3d 220, 230 (4th Cir. 2020).

Moreover, this Court's decision highlights the impropriety of the district court's new preliminary injunction in the face of conflicting views of the merits in courts across the country. As this Court explained, "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, and further recognized that the Supreme Court's stay extended not only for the duration of review in this Court, but also until the disposition of any petition for a writ of certiorari that the government might choose to file. *New York*, 969 F.3d at 88-89; *see* JA 327; *Cook County*, 140 S. Ct.

at 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 this Court's holding. *See Casa de Maryland, Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020), *petition for rehe'g en banc pending*. 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*, 969 F.3d at 73. These conflicts in authority underscore the anomaly inherent in a district court's determination that its assessment of the propriety of an injunction while the appeals wend their way to the Supreme Court should be given precedence over the Supreme Court's considered judgment on that topic. It was an abuse of discretion for the district court to re-impose its views of the merits on the government in the midst of that sprawling litigation, without even addressing those other courts' views.

III. The District Court Independently Erred By Issuing A Nationwide Injunction

At a minimum, this Court should vacate 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*, 969 F.3d at 88. 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 limitation of the scope 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 v. Whole Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). 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*, 969 F.3d at 88; *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. *New York*, 969 F.3d at 88. Two Justices emphasized the inappropriateness of nationwide injunctions in the context of these very cases. JA 327-331 (Gorsuch, J.,

concurring, joined by Thomas, J.). The Fourth Circuit not only stayed a preliminary injunction against the Rule, Order, *Casa de Maryland*, No. 19-2222, but then reversed the grant of that injunction because the Rule "clearly" falls within DHS's authority to define "public charge," *Casa de Maryland*, 971 F.3d at 255. And the Ninth Circuit has stayed preliminary injunctions against the Rule issued by district courts in its jurisdiction. *San Francisco*, 944 F.3d at 773. The district court's decision here should not be permitted to override those rulings and stays issued by the Supreme Court and other federal courts of appeals, thereby dictating treatment of the Rule for the entire country.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the court's preliminary injunction should be vacated.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

AUDREY STRAUSS
Acting United States Attorney

DANIEL TENNY
GERARD SINZDAK
JOSHUA DOS SANTOS

s/ Jack Starcher
JACK STARCHER
Attorneys, Appellate Staff
Civil Division, Room 7515
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-8877
John.e.starcher@usdoj.gov

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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 8,574 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 September 28, 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