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: Clarification of Order Granting Stay Pending Appeal

Set forth below precise, complete statement of relief sought:

Clarification that the Court's Sept. 11, 2020 Order granting a stay pending appeal of the District Court's July 29, 2020 preliminary injunction stays the injunction prospectively but does not permit Defendants to apply the enjoined rule to persons who filed applications or used benefits during the period that the injunction was in effect, from July 29, 2020 – September 11, 2020.

State of New York v. United States Department of Ho

MOVING PARTY: Make the Road New York, et al. **OPPOSING PARTY:** Kenneth T. Cuccinelli, et al.

☑ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☑ Appellee/Respondent

MOVING ATTORNEY: Jonathan Hurwitz **OPPOSING ATTORNEY:** Jack Starcher

[name of attorney, with firm, address, phone number and e-mail]

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Court- Judge/ Agency appealed from: U.S. District Court for the Southern District of New York (Daniels, J.)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

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

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

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/ Jonathan Hurwitz **Date:** 10/22/2020 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

No. 20-2537

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, ASIAN AMERICAN FEDERATION, CATHOLIC CHARITIES COMMUNITY SERVICES, and CATHOLIC LEGAL IMMIGRATION NETWORK, INC.,

Plaintiffs-Appellees,

v.

KENNETH T. CUCCINELLI, in his official capacity as Acting Director of USCIS, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants-Appellants.

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

PLAINTIFFS-APPELLEES' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLARIFICATION OF ORDER GRANTING STAY PENDING APPEAL

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PRELIMINARY STATEMENT

On September 11, 2020, a panel of this Court granted Defendants' request for a stay pending the appeal, *State of New York* v. *Dep't of Homeland Sec.*, 974 F.3d 210 (2d Cir. 2020) (the "Stay Order"). The Stay Order stayed the District Court's decision and order, entered on July 29, 2020, approximately six weeks earlier, granting a temporary preliminary injunction until the end of the public health emergency caused by COVID-19. *See State of New York* v. *Dep't of Homeland Sec.,* 2020 WL 4347264, *13 (S.D.N.Y. July 29, 2020) (the "COVID-19 Injunction").

Plaintiffs sought the COVID-19 Injunction based on "ample evidence that the [Public Charge] 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." *Id.* at *10. In granting Plaintiffs' request for relief the District Court enjoined Defendants from "enforcing, applying, implementing, or treating as effective the [Public Charge] Rule for any period during which there is a declared national health emergency in response to the COVID-19 outbreak." *Id.* at *14.

Organizational Plaintiffs[1] now seek by this motion clarification of the Stay

[1] Organizational Plaintiffs are 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.

Order. In particular, they respectfully request that the Court confirm that the Stay Order merely *stayed* the COVID-19 Injunction as of September 11, 2020 until a decision is rendered on the pending appeal, and that it did not *void* the COVID-19 Injunction retroactively to July 29, 2020, the date it was issued.

Clarification is necessary because Defendants' statements and actions since the Stay Order was issued have treated the Stay Order as voiding the COVID-19 Injunction retroactively. Rather than applying the prior rules governing public charge (the 1999 Field Guidance[2]) to applications for adjustment to Lawful Permanent Residence ("LPR") status and applications to extend or change nonimmigrant status filed between July 29, 2020 and September 11, 2020 while the COVID-19 Injunction was in place, Defendants have announced on the USCIS website that they will treat *each and every* application filed since February 24, 2020 as subject to the Final Rule of Department of Homeland Security titled "Inadmissibility on Public Charge Grounds," 84 Fed. Reg. 41,292 (Aug. 14, 2019) (the "Public Charge Rule"), including applications filed while the COVID-19 Injunction was in effect. *See Injunction on Inadmissibility on Public Charge Grounds Final Rule*, USCIS (last updated Oct. 9, 2020), available at:

[2] Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999).

https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/injunction-of-the-inadmissibility-on-public-charge-grounds-final-rule[3] (the "Current Injunction Alert"). The Current Injunction Alert is also silent on the issue of whether benefits used during the pendency of the COVID-19 Injunction will count in a public charge analysis. Until the Current Injunction Alert was posted on or about September 22, 2020, the USCIS took the position that the agency would evaluate such applications under the 1999 Field Guidance so long as the COVID-19 Injunction remained in effect. S*ee Injunction on Inadmissibility on Public Charge Grounds Final Rule*, USCIS (version last updated Aug. 4, 2020), attached as Exhibit A to the Declaration of Sonya Schwartz in Support of this Motion ("Prior Injunction Notice").[4] This remained the Agency's position even after this

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[3] The Current Injunction Alert states in full:

> Alert: On Sept. 11, 2020, the U.S. Court of Appeals for the Second Circuit issued a decision that allows DHS to resume implementing the Public Charge Ground of Inadmissibility final rule nationwide, including in New York, Connecticut and Vermont. The decision stays the July 29, 2020, injunction, issued during the coronavirus (COVID-19) pandemic, that prevented DHS from enforcing the public charge final rule during a national health emergency.
>
> Therefore, we will apply the public charge final rule and related guidance in the USCIS Policy Manual, Volumes 2, 8 and 12, to all applications and petitions postmarked (or submitted electronically) on or after Feb. 24, 2020. If you send your application or petition by commercial courier (for example, UPS, FedEx, or DHL), we will use the date on the courier receipt as the postmark date.

[4] The Prior Injunction Notice provided in pertinent part:

Court issued an administrative stay limiting the COVID-19 Injunction to the Second Circuit on August 12, 2020. Order, *State of New York* v. *Dep't of Homeland Sec.*, No. 20-2537 (2d Cir. Aug. 12, 2020), Dkt. 35 (the "Administrative Stay").

The Organizational Plaintiffs respectfully submit that the Stay Order should not permit Defendants now to negate the COVID-19 Injunction retroactively during the six weeks that it was in place, particularly absent a decision on the merits of the pending appeal. Allowing the Stay Order to apply retroactively in this manner is inconsistent with the Court's actions and Defendants' prior public statements, and unfair to the Organizational Plaintiffs and an untold number of noncitizens who relied on the COVID-19 Injunction while it was in effect and who had no reason to expect that any stay would apply retroactively.

As long as the July 29, 2020, SDNY decision is in effect, USCIS will apply the 1999 public charge guidance that was in place before the Public Charge Rule was implemented on Feb. 24, 2020. In addition, USIS will adjudicate any application or petition for extension of nonimmigrant stay or change of nonimmigrant status on or after July 29, 2020, consistent with regulations in place before the Public Charge Rule was implemented; in other words, we will not apply the public benefit condition.

ARGUMENT

The Stay Order Does Not Void the COVID-19 Injunction From July 29 Through September 11, 2020.

Organizational Plaintiffs request the Court clarify that the Stay Order shall not be given the retroactive effect ascribed by the Defendants for the following reasons.

First, the Stay Order itself does not state or imply that it should apply retroactively. Federal Rule of Appellate Procedure 8 permits a party to move for "an order suspending, modifying, restoring, or granting an injunction while an appeal is pending." Fed. R. App. P. 8(a)(1)(C). The Stay Order grants Defendants' narrow request for relief: that the COVID-19 injunction be "stayed pending further order of this Court." *See* Stay Order, *State of New York*, 974 F.3d 210; Defs. Motion for Stay (seeking "administrative stay" and a "stay pending appeal" Document 25, 8/7/2020). Consistent with the ordinary meaning of the word "stay," courts recognize that the issuance of a stay results in "halting or postponing some portion of the proceeding, or . . . temporarily divesting an order of enforceability." *Nken* v. *Holder*, 556 U.S. 418, 428 (2009); *see Frith* v. *Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 900 (5th Cir. 1975) (rejecting petition for dissolution of a prohibitory injunction pursuant to Federal Rule of Appellate Procedure 8(a) because a stay is not the same as "a vacation of an injunction entered by the District Court"; Rule 8(a) "only authorizes stays or injunctions

pending appeal"). Defendants' actions and statements treating the Stay Order as retroactive to the date the COVID-19 Injunction was issued are inconsistent with the plain meaning of the Stay Order.[5]

Second, Defendants impermissibly ignore the predictable expectations of those who relied on the COVID-19 Injunction during the six-week period it was in effect, in violation of basic principles of due process and fairness. *See, e.g., De Niz Robles* v. *Lynch*, 803 F.3d 1165, 1180 (10th Cir. 2015) (Gorsuch, J.) (holding that principles of due process and equal protection required noncitizen's petition for adjustment of status to be governed by the rules in place when the petition was filed, and not by agency's subsequent interpretation of governing statute that would have rendered the petitioner ineligible for adjustment of status); *see generally Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law."). The COVID-19 Injunction by its terms enjoined Defendants from "enforcing, applying, implementing, or treating as effective the [Public Charge] Rule for any period during which there is a declared national health emergency in response to the COVID-19 outbreak." *State of New York,* 2020 WL 4347264, at *14. Organizational Plaintiffs reasonably

[5] Treating the Stay Order as prospective instead of retroactive is also consistent with the Court's August 12, 2020 Administrative Stay which stayed the COVID-19 Injunction everywhere but in New York, Connecticut, and Vermont. The Court did not at that time take the opportunity to issue a full, nationwide administrative stay.

relied on the COVID-19 Injunction in advising their clients that applications for LPR status submitted while the injunction was in effect would be considered under the 1999 Field Guidance rather than the Public Charge Rule and that supplemental benefits used during that time would likewise not be counted against them. In turn, their clients relied on the COVID-19 Injunction in deciding whether to move forward with their applications and in deciding to use benefits. Such reliance was reinforced by the Administrative Stay which stayed the application of the COVID-19 Injunction outside the Second Circuit prospectively, not retroactively. Retroactively changing the law that applies to the applications filed and benefits used during the period of the injunction is unfair and unlawful.

Third, Defendants' actions contradict the precedent that they themselves set in this case. Following the Supreme Court's issuance of the January 27, 2020 order granting the Defendants' request for a stay of the District Court's October 11, 2019 injunction of the Public Charge Rule, Defendants did not seek to impose the Public Charge Rule retroactively to October 15, 2019, its original effective date. Rather, Defendants set a new effective date that post-dated the Supreme Court's decision: February 24, 2020. This made practical and legal sense. As a consequence, anyone who relied upon the injunction during the preceding four months did not have their reliance interests uprooted retroactively. In contrast, the Current Injunction Alert reflects Defendants' decision to ascribe new

consequences to the decisions made by intending immigrants who filed applications or used benefits during the period of July 29, 2020 through September 11, 2020, while the COVID-19 Injunction was in effect. Defendants should not be permitted to expand the Court's Stay Order beyond its terms in this manner.

CONCLUSION

For the foregoing reasons, Organizational Plaintiffs respectfully request the Court issue an order clarifying that the Stay Order does not retroactively invalidate the COVID-19 Injunction for the period in which it was in effect.

Dated: New York, New York
October 22, 2020

By: */s/* Jonathan H. Hurwitz

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Jonathan H. Hurwitz, counsel for Plaintiffs-Appellees Make the Road New York, African Services Committee, Asian American Federation, Catholic Charities Community Services, and Catholic Legal Immigration Network, Inc., and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 27(d), that Plaintiffs-Appellees' attached Response to Motion for Emergency Stay of Preliminary Injunction Pending Appeal and Request for Immediate Administrative Stay is proportionately spaced, has a typeface of 14 points or more, and contains 1,725 words.

/s/ Jonathan H. Hurwitz
Jonathan H. Hurwitz

October 22, 2020

No. 20-2537

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, ASIAN AMERICAN FEDERATION, CATHOLIC CHARITIES COMMUNITY SERVICES, and CATHOLIC LEGAL IMMIGRATION NETWORK, INC.,

Plaintiffs-Appellees,

v.

KENNETH T. CUCCINELLI, in his official capacity as Acting Director of USCIS, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants-Appellants.

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

DECLARATION OF SONYA SCHWARTZ IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION FOR CLARIFICATION OF ORDER GRANTING STAY PENDING APPEAL

I, Sonya Schwartz, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am an attorney and the principal of Sonya & Partners, LLC, a consulting firm specializing in public policy advocacy for nonprofit organizations focused on improving access to health care and economic supports for immigrants and their families. I serve as a consultant to the National Immigration Law Center ("NILC"), where I work on the "Protecting Immigrant Families, Advancing Our

Future" (PIF) campaign. The mission of the PIF campaign is to unite, advance, protect and defend access to health care, nutrition programs, public services and economic support for immigrants and their families at the local, state and federal level.

2. I submit this Declaration in support of Plaintiffs-Appellees' Motion for Clarification of Order Granting Stay Pending Appeal.

3. In the ordinary course of business, I regularly monitor the USCIS website for information about changes to the agency's implementation of the public charge rule.

4. On September 7, 2020, I visited the USCIS website to look at the page entitled "Injunction of the Inadmissibility on Public Charge Grounds Final Rule," at https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/injunction-of-the-inadmissibility-on-public-charge-grounds-final-rule. A true and accurate copy of a screenshot of that website which I created on September 7, 2020, and which reflects the content of that website as of that date, is attached as Exhibit A to this Declaration.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 22nd day of October, 2020
District of Columbia

Sonya Schwartz

Exhibit A

Injunction of the Inadmissibility on Public Charge Grounds Final Rule

On July 29, 2020, the U.S. District Court for the Southern District of New York (SDNY) in State of New York, et al. v. DHS, et al. and Make the Road NY et al. v. Cuccinelli, et al. enjoined the Department of Homeland Security (DHS) from enforcing, applying, implementing, or treating as effective the Inadmissibility on Public Charge Grounds Final Rule for any period during which there is a declared national health emergency in response to the COVID-19 outbreak. (84 FR 41292, Aug. 14, 2019, final rule; as amended by 84 FR 52357, Oct. 2, 2019, final rule correction)

On Jan. 31, 2020, the Secretary of Health and Human Services declared a public health emergency, effective Jan. 27, 2020, under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to COVID-19. On Feb. 24, 2020, DHS implemented the Public Charge Rule to be applied prospectively to any application or petition postmarked, or if applicable, submitted electronically on or after that date. On March 13, 2020, the President issued Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. On the same day, USCIS issued an alert addressing COVID-19 and public charge determinations under the Public Charge Rule.

As long as the July 29, 2020, SDNY decision is in effect, USCIS will apply the 1999 public charge guidance that was in place before the Public Charge Rule was implemented on Feb. 24, 2020 to the adjudication of any application for adjustment of status on or after July 29, 2020. In addition, USCIS will adjudicate any application or petition for extension of nonimmigrant stay or change of nonimmigrant status on or after July 29, 2020, consistent with regulations in place before the Public Charge Rule was implemented; in other words, we will not apply the public benefit condition.

For applications and petitions that USCIS adjudicates on or after July 29, 2020, pursuant to the SDNY injunction, USCIS will not consider any information provided by an applicant or petitioner that only relates to the evidence required by the Public Charge Rule, including information provided on the Form I-944 or any supporting documentation included with that form, or information on the receipt of public benefits in Part 5 on Form I-539, Part 3 on Form I-539A, Part 6 on Form I-129, or Part 6 on Form I-129CW, or any additional documentation pertaining to the public benefit condition. Applicants and petitioners whose applications or petitions are postmarked on or after July 29, 2020, should not include the Form I-944 or provide information about the receipt of public benefits on Form I-485, Form I-129, Form I-129CW, Form I-539, or Form I-539A.

USCIS will issue guidance regarding the use of affected forms. In the interim, USCIS will not reject any Form I-485 on the basis of the inclusion or exclusion of Form I-944, nor Forms I-129 and I-539 based on whether

Part 6, or Part 5, respectively, has been completed or left blank.

In any public charge inadmissibility determination, USCIS will consider the receipt of public benefits consistently with prior public charge guidance – the 1999 Interim Field Guidance (PDF) and AFM Ch. 61.1. (PDF, 77.92 KB)

Last Reviewed/Updated: 08/04/2020

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